Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

v.

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

SANA F. SHTASEL
PETER BARTON HUTT
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. A CAUSE OF ACTION FOR MONEY DAMAGES IS PROPERLY IMPLIED DIRECTLY UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION 10

A. It Must Be Taken As True That Defendant Fired Plaintiff Solely And Expressly On The Basis Of Her Sex 10

B. Employment Discrimination Based Solely On Sex By A Member Of Congress Violates The Equal Protection Component Of The Fifth Amendment Due Process Clause 11

C. *Bivens* Compels Implication Of A Cause Of Action For Money Damages On the Facts Of This Case 13

1. The Opinion Below Is Inconsistent With *Bivens* 14

a. *Bivens* held that a violation of the Constitution gives rise to the presumption of a private cause of action 15

b. *Bivens* held that a remedy in money damages need not be "indispensable" for a private cause of action to be implied 16

Page

c. If a cause of action was implied in *Bivens*, where an adequate state remedy existed, *a fortiori* one must be implied here where there is no other remedy 19

2. Nine Courts Of Appeals Have Applied *Bivens* To Constitutional Provisions Other Than The Fourth Amendment, And None Has Agreed With The Opinion Below 20

3. *Bivens* Applies To Members Of Congress In The Same Way It Applies To All Other Federal Officials 24

D. Although The "Statutory Implication" Criteria Articulated By This Court In *Cort v. Ash* Are Inapplicable In A Case Involving A Violation Of The Constitution, The Instant Case Nonetheless Satisfies Each Of Those Criteria 26

1. Plaintiff Is One Of The Class For Whom The Fifth Amendment Was Enacted 27

2. The "Legislative Intent" Of The Framers Supports Implication Of A Cause Of Action Here 29

3. The Underlying Purpose Of The Fifth Amendment Supports Implication Of A Private Cause Of Action Here 32

4. Plaintiff's Claim Here Raises Traditional Federal Issues And Is Not A State Concern Controlled By State Law 34

Page

E. Although "Congressional Intent" As Determined By Subsequent Enactment Of Legislation Is Irrelevant In Determining Whether A Private Cause Of Action Exists Under The Constitution, Congress Has In Fact Made Clear Its Policy Prohibiting Sex Discrimination By Its Members 36

1. 5 U.S.C. §7151 Prohibits Sex Discrimination By A Member of Congress ... 37

2. House Rule XLIII And Senate Rule L(50) Prohibit Sex Discrimination By A Member of Congress 38

3. The Decision Of The Court Below Contravenes Congressional Intent Reflected In The Enactment of 42 U.S.C. §1983 And 28 U.S.C. §1331(a) 39

4. The Lower Court Misinterpreted The Civil Rights Act Of 1964 41

5. 2 U.S.C. §92 Does Not Authorize A Member Of Congress To Engage In Unconstitutional Discrimination 45

6. Principles Of Statutory Construction Require That Title VII And 2 U.S.C. §92 Be Interpreted To Exclude Unconstitutional Conduct 48

II. THE SPEECH OR DEBATE CLAUSE DOES NOT PROVIDE IMMUNITY TO DEFENDANT FOR UNCONSTITUTIONAL SEX DISCRIMINATION IN THE INSTANT CASE 50

A. Because Discharging A Secretary Solely And Expressly On The Basis Of Her Sex Is Not Within The "Sphere Of Legislative Activity," The Speech Or Debate Clause Affords Defendant No Legislative Immunity 50

Page

1. Both The History And Plain Meaning Of The Speech Or Debate Clause Compel The Conclusion That It Does Not Protect Defendant Here 52
2. Prior Case Law Affords Defendant No Protection Under The Speech Or Debate Clause 54
3. The Speech Or Debate Clause Should Be Construed Narrowly When Claimed As A Defense To Unconstitutional Conduct 60

B. Even Though A Coordinate Branch Of Government Is Involved, This Court Should Not Decline To Enforce The Constitution 62

1. This Court Has Sustained Individual Rights In Actions Against Congress And The Executive Branch 62
2. Defendant's Action Is *Ultra Vires* And Not Entitled To Judicial Self-Restraint 66

CONCLUSION 68

TABLE OF AUTHORITIES

Page

Cases:

Ammond v. *McGahn*,
390 F. Supp. 655 (D.N.J. 1975), *rev'd on other grounds*, 532 F.2d 325 (3d Cir. 1976) 40

Ashwander v. *TVA*,
297 U.S. 288 (1936) 48

Baines v. *City of Danville*,
337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965) 48

Baker v. *Carr*,
369 U.S. 186 (1962) 64,66

Barr v. *Matteo*,
360 U.S. 564 (1959) 61

Bell v. *Hood*,
327 U.S. 678 (1946) 14,22,36,65

Bennett v. *Campbell*,
564 F.2d 329 (9th Cir. 1977) 21

Bethea v. *Reid*,
445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) 21

Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*,
403 U.S. 388 (1971) ..... *Passim*

Board of Regents v. *Roth*,
408 U.S. 564 (1972) 46

Bolling v. *Sharpe*,
347 U.S. 497 (1954) 11

Page

Bowman v. *Texas Education Foundation, Inc.*, 454 F.2d 1097 (5th Cir. 1972).....48

Bridgeport Guardians, Inc. v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *appeal after remand*, 497 F.2d 1113 (1974), *cert. denied*, 421 U.S. 991 (1975).....46

Brown v. *General Services Administration*, 425 U.S. 820 (1976).....42

Butler v. *United States*, 365 F. Supp. 1035 (D. Hawaii 1973).....23

Butz v. *Economou*, 98 S. Ct. 2894 (1978).....32,40,41,43,51,61,62

Califano v. *Goldfarb*, 430 U.S. 199 (1977).....11,12

Cannon v. *University of Chicago*, 559 F.2d 1063 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 3142 (1978).....22

Coleman v. *Miller*, 307 U.S. 433 (1939).....64

Consumers Union of the United States, Inc. v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975).....56

Cort v. *Ash*, 422 U.S. 66 (1975).....*Passim*

Craig v. *Boren*, 429 U.S. 190 (1976), *reh. denied*, 429 U.S. 1124 (1977).....11,12

Davis v. *Passman*, 544 F.2d 865 (5th Cir. 1977).....1,5,49

Davis v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc).....1,6

Page

Dellums v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 3146 (1978).....21

District of Columbia v. *Carter*, 409 U.S. 418 (1973).....39

Doe v. *McMillan*, 412 U.S. 306 (1973).....51,55,56,64

Dombrowski v. *Eastland*, 387 U.S. 82 (1967).....51,57,58,60,64

Douglas v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).....46

Dry Creek Lodge, Inc. v. *United States*, 515 F.2d 926 (10th Cir. 1975).....22

Dugan v. *Rank*, 372 U.S. 609 (1963).....67

Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 (1975).....51,52,53,54,57,64

Elrod v. *Burns*, 427 U.S. 347 (1976).....11,58

Eslinger v. *Thomas*, 476 F.2d 225 (4th Cir. 1973).....40

Ex Parte Virginia, 100 U.S. 339 (1879).....40

Examining Board of Engineers, Architects and Surveyors v. *Otero*, 426 U.S. 572 (1976).....13,30,31

Expeditions Unlimited Aquatic Enterprises, Inc. v. *Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).....32

Fitzgerald v. *Porter Memorial Hospital*, 523 F.2d 716 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976).....22

Page

Florida East Coast Ry. v. *United States*,
259 F. Supp. 993 (M.D. Fla. 1966) (3-judge court), *aff'd*, 386 U.S. 544 (1967) 48

Frontiero v. *Richardson*,
411 U.S. 677 (1973) 12,47

Gardels v. *Murphy*,
377 F. Supp. 1389 (N.D. Ill. 1974) 23

Gentile v. *Wallen*,
562 F.2d 193 (2d Cir. 1977) 20

Gilligan v. *Morgan*,
413 U.S. 1 (1973) 67

Gravel v. *United States*,
408 U.S. 606 (1972) ..... *Passim*

Gray v. *Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975) 21,44

Griggs v. *Duke Power Co.*,
401 U.S. 424 (1971) 46

Haines v. *Kerner*,
404 U.S. 519, *reh. denied*, 405 U.S. 948 (1972) 67

Hampton v. *Mow Sun Wong*,
426 U.S. 88 (1976) 42

Hanna v. *Drobnick*,
514 F.2d 393 (6th Cir. (1975) 44

Hostrop v. *Board of Junior College District No.* 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied*,
425 U.S. 963 (1976) 22,44

Hutchinson v. *Proxmire*,
579 F.2d 1027 (7th Cir. 1978) 56

Hyrup v. Kleppe,
406 F. Supp. 214 (D. Colo. 1976) 48

Page

Iowa ex rel. State Highway Commission v. *Brinegar*, 512 F.2d 722 (8th Cir. 1975) 66

J.I. Case Co. v. *Borak*,
377 U.S. 426 (1964) 34

Jacobson v. *Tahoe Regional Planning Agency*,
566 F.2d 1353 (9th Cir. 1978), *amending on denial of rehearing*, 558 F.2d 928 (9th Cir. 1977) 20,21

Johnson v. *Reagan*,
524 F.2d 1123 (9th Cir. 1975) 40

Jones v. *Alfred H. Mayer Co.*,
392 U.S. 409 (1968) 30,49

Jones v. *City of Memphis*,
No. 77-1704 (6th Cir. Sept. 19, 1978) 21

Kahn v. *Shevin*,
416 U.S. 351 (1974) 48

Katz v. *United States*,
389 U.S. 347 (1967) 28

Kilbourn v. *Thompson*,
103 U.S. 168 (1880) 51,54,56,58,60,64,67

Kostka v. *Hogg*,
560 F.2d 37 (1st Cir. 1977) 23

Land v. *Dollar*,
330 U.S. 731 (1947) 51

Larson v. *Domestic & Foreign Commerce Corp.*,
337 U.S. 682 (1949) 67

Loe v. *Armistead*,
582 F.2d 1291 (4th Cir. 1978) 21

Louisiana ex rel. Guste v. *Brinegar*,
388 F. Supp. 1319 (D.D.C. 1975) 66

Lynch v. *Household Finance Co.*,
405 U.S. 538 (1972) 39

Page

McDonald v. *Illinois*,
557 F.2d 596 (7th Cir.), *cert. denied*, 98 S. Ct. 508 (1977) 22

McSurely v. *McClellan*,
521 F.2d 1024 (D.C. Cir. 1975), *aff'd by an equally divided court*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom. McAdams* v. *McSurely*, 98 S. Ct. 3116 (1978)..... 55,57,60,68

Marbury v. *Madison*,
1 Cranch 137 (1803) 13,66

Massachusetts v. *Laird*,
400 U.S. 886 (1970) 64

Miranda v. *Arizona*,
384 U.S. 436 (1966) 49

Mitchem v. *Foster*,
407 U.S. 225 (1972) 40

Monell v. *New York City Dept. of Social Services*,
98 S. Ct. 2018 (1978) 20,23,35,44,45

Monroe v. *Pape*,
365 U.S. 167 (1961) 35,41

Morton v. *Mancari*,
417 U.S. 535 (1974) 48

Mt. Healthy City Board of Education v. *Doyle*,
429 U.S. 274 (1977) 35

National Treasury Employee's Union v. *Nixon*,
492 F.2d 587 (D.C. Cir. 1974) 66

Nixon v. *Administrator of General Services*,
433 U.S. 425 (1977) 66

Northern Natural Gas Co. v. *Grounds*,
411 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971) 48

Page

Owen v. *City of Independence*,
560 F.2d 925 (8th Cir. 1977), *vacated and remanded for further consideration*, 98 S. Ct. 3118 (1978) 20,44

Panama Canal Co. v. *Anderson*,
312 F.2d 98 (5th Cir. 1963) 48

Parker v. *McKeithen*,
488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974) 40

Paton v. *La Prade*,
524 F.2d 862 (3d Cir. 1975) 22,24,33,41

Patterson v. *City of Chester*,
389 F. Supp. 1093 (E.D. Pa. 1975) 23

Payne v. *District of Columbia*,
559 F.2d 809 (D.C. Cir. 1977) 22

Peacock v. *Board of Regents*,
380 F. Supp. 1081 (D. Ariz. 1974), *aff'd*, 510 F.2d 1324 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975) 23

Pennsylvania v. *Lynn*,
501 F.2d 848 (D.C. Cir. 1974) 66

Perry v. *Sindermann*,
408 U.S. 593 (1972) 46

Powell v. *McCormack*,
395 U.S. 486 (1969) 51,54,58,64,65,66

Radovich v. *National Football League*,
352 U.S. 445 (1957) 11

Reed v. *Reed*,
404 U.S. 71 (1971) 12

Reeves v. *City of Jackson*,
532 F.2d 491 (5th Cir. 1976) 22,44

Page

Roane v. *Callisburg Independent School District*,
511 F.2d 633 (5th Cir. 1975) 23

Rodriguez v. *Barcelo*,
358 F. Supp. 43 (D.P.R. 1973) 23

Rodriguez v. *Ritchey*,
556 F.2d 1185 (5th Cir. 1977) (en banc),
cert. denied, 98 S. Ct. 894 (1978) 23

Schlesinger v. *Ballard*,
419 U.S. 498, *reh. denied*, 420 U.S.
966 (1975) 12

Silver v. *New York Stock Exchange*,
373 U.S. 341 (1963) 46

Silverman v. *United States*,
365 U.S. 505 (1961) 28

Snowden v. *Hughes*,
321 U.S. 1 (1944) 11

Stanton v. *Stanton*,
421 U.S. 7 (1975) 12

States Marine Lines, Inc. v. *Shultz*,
498 F.2d 1146 (4th Cir. 1974) 20

Sullivan v. *Murphy*,
478 F.2d 938 (D.C. Cir.), *cert. denied*,
414 U.S. 880 (1973) 22

Tarble's Case,
13 Wall 397 (1892) 19

Tenney v. *Brandhove*,
341 U.S. 367 (1951) 40,51,54,60,64,67

Testa v. *Katt*,
330 U.S. 386 (1947) 19

Texas & Pacific Ry. Co. v. *Rigsby*,
241 U.S. 33 (1916) 27

Page

Traylor v. *City of Amarillo*,
492 F.2d 1156 (5th Cir. 1974) 23

Turpin v. *Mailet*,
579 F.2d 152 (2d Cir. 1978) (en banc) 21,24,42,44

United Farmworkers of Florida Housing Project, Inc. v. *City of Delray Beach*, 493 F.2d 799
(5th Cir. 1974) 23

United States v. *Brewster*,
408 U.S. 501 (1972) ..... *Passim*

United States ex rel. Moore v. *Koelzer*,
457 F.2d 892 (3d Cir. 1972) 20

United States v. *Five Gambling Devices*,
346 U.S. 441 (1953) 48

United States v. *Johnson*,
383 U.S. 169 (1966) 51,52,56,60,63,64

United States v. *Nixon*,
418 U.S. 683 (1974) 66

United States v. *Standard Oil Co.*,
332 U.S. 301 (1947) 62

Walker v. *McCune*,
363 F. Supp. 254 (E.D. Va. 1973) 23

Washington v. *Brantley*,
353 F. Supp. 559 (M.D. Fla. 1972) 23

Washington v. *Davis*,
426 U.S. 229 (1976) 11

Weinberger v. *Wiesenfeld*,
420 U.S. 636 (1975) 12

Weir v. *Muller*,
527 F.2d 872 (5th Cir. 1976) 22

Yiamouyiannis v. *Chemical Abstracts Service*,
521 F.2d 1392 (6th Cir. 1975) 22

Page

Zwickler v. *Koota*,
389 U.S. 241 (1967) 39

United States Constitution:

Article 1, §6 3,5,26,50,51
Article 1, §8 64
First Amendment 21,22,23,24,40,41,58
Fourth Amendment ..... *Passim*
Fifth Amendment ..... *Passim*
Eighth Amendment 22,23
Fourteenth Amendment ..... *Passim*

Statutes and Resolutions:

2 U.S.C. §92 45,46,48
5 U.S.C. §2101(1) 37
5 U.S.C. §2105(a)(1) 37
5 U.S.C. §2105(a)(1)(B) 37
5 U.S.C. §3331 3,26,66
5 U.S.C. §7151,
Pub. L. No. 89-554, 80 Stat. 523 3,8,9,37,39,48,63
28 U.S.C. §1254(1) 2
28 U.S.C. §1331(a) 3,18,39,65
28 U.S.C. §1343(3) 30,44
42 U.S.C. §1981 46
42 U.S.C. §1982 30
42 U.S.C. §1983 ..... *Passim*
Civil Rights Act of 1871 39,44
Civil Rights Act of 1964, Title VII
(42 U.S.C. §2000(e) *et seq.*) 30,41,42,43,44,46,48
Federal Tort Claims Act
(28 U.S.C. §§1346(b), 2680(h)) 33

Page

Full Employment and Balanced Growth Act of 1978,
Pub. L. No. 95-523, 92 Stat. 1887 47
H.R. Rep. No. 1656, 94th Cong., 2d Sess.
1976) 34
H.R. Res. 1380, 95th Cong., 2d Sess., 124 Cong.
Rec. H10697 (daily ed. September 25, 1978)
(introduced but text not printed) 49
House Rule XLIII, Rules of the House of Representatives, H.R. Doc. No. 663, 94th Cong., 2d
Sess. 674 (1977) 38,39
S. Rep. No. 588, 93d Cong., 1st Sess. (1973) 33
S. Rep. No. 729, 95th Cong., 2d Sess. (1978) 47,49
S. Res. 431, 124 Cong. Rec. S18206-208 (daily
ed. October 11, 1978) 47,49
Senate Rule L(50), Senate Manual, S. Doc. No. 1,
95th Cong., 1st Sess. 109 (1977) 38

Legislative Materials:

124 Cong. Rec. S18209 (daily ed. October 11,
1978) (remarks of Sen. Brooke) 49
124 Cong. Rec. S18228 (daily ed. October 11,
1978) (remarks of Sen. Glenn) 47,49
1 *Annals of Congress* 450 (Gales & Seaton eds.
1789) 31,32
Congressional Globe, 42d Cong., 1st Sess. 569
(1871) 41
"Constitutional Immunity of Members of Congress,"
Hearings Before the Joint Committee on Congressional Operations, 93d Cong., 1st Sess.
(1973) 53

Miscellaneous:

Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532
(1972) 19

Page

Frankfurter & Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1927) 39

Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 30

Reinstein & Silverglate, *Legislative Privilege and The Separation of Powers*, 86 Harv. L. Rev. 1113 (1973) 61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

v.

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the en banc court of appeals, reported at 571 F.2d 793, appears at A. 44-95.[1] The opinion of the panel of the court of appeals, reported at 544 F.2d 865, appears at A. 11-40. The opinion of the United States District Court for the Western District of Louisiana, which is not reported, appears at A. 9-10.

---

[1]Citations to A._____ are to the Appendix filed in this Court; citations to R._____ are to the Record certified to this Court by the court below.

JURISDICTION

A divided panel of the United States Court of Appeals for the Fifth Circuit reversed a judgment of the district court on January 3, 1977. Timely petitions for rehearing and rehearing en banc were granted by order dated May 17, 1977, which appears at A. 43. The judgment of the court of appeals on rehearing en banc was entered April 18, 1978, and appears at A. 96-97. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a cause of action for money damages may be implied directly from the Fifth Amendment to the United States Constitution under the rationale of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the Speech or Debate Clause of the United States Constitution bars an action for money damages against a federal congressman who fired his office supervisor solely and expressly on the basis of her sex.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Article 1, §6 of the Constitution of the United States provides in pertinent part:

> ". . . for any speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

Section 7151 of Title 5 of the United States Code provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin."

Section 3331 of Title 5 of the United States Code provides:

> "An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . . .'"

Section 1331(a) of Title 28 of the United States Code provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . ."

STATEMENT OF THE CASE

This is a case of indisputable sex discrimination in employment. Plaintiff Shirley Davis was employed by

defendant Otto E. Passman, United States Congressman from the Fifth Congressional District of Louisiana, as his Deputy Administrative Assistant from February 1, 1974 through July 31, 1974. In this capacity, plaintiff was engaged in general secretarial and other clerical work. As defendant himself acknowledged, plaintiff has "experience and talent" and is an "extremely capable secretary." (A. 6.) Nonetheless, defendant terminated plaintiff's employment, stating in his June 21, 1974 letter of dismissal:

> "You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man." *Id.*

Plaintiff has no federal or state remedy, under statute or common law, to redress her injuries. She therefore filed this action in the United States District Court for the Western District of Louisiana on August 7, 1974, alleging that defendant's conduct constituted sex discrimination in violation of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiff requested money damages, including back pay, as well as various forms of specific relief that are now moot because defendant is no longer in office.[2]

Defendant moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending (1) his alleged conduct — discharging plaintiff

[2]Defendant was defeated in the 1976 primary election, and his tenure in office ended January 3, 1977.

because of her sex — did not violate the Fifth Amendment; (2) plaintiff has no private right of action; and (3) the suit is barred by the doctrines of sovereign and official immunity. On February 26, 1975, the district court granted the motion, ruling in defendant's favor on the first two issues, but also holding that the immunity doctrines would not bar plaintiff's suit. (A. 9-10.)

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit, in a 2-1 decision, reversed and remanded. 544 F.2d 865 (A. 11-40). The majority held (1) dismissal of staff by a member of Congress on the basis of sex violates the equal protection component of the Fifth Amendment Due Process Clause (A. 13-19); (2) plaintiff has a private right of action for damages arising directly under the Fifth Amendment (A. 21-29); (3) sovereign immunity is no bar to a damage award against a congressman as an individual (A. 29-31); (4) legislative immunity, granted by the Speech or Debate Clause of the United States Constitution, art. I, §6, does not extend to staff dismissals since that conduct is not within the "sphere of legitimate legislative activity" (A. 31-38); and (5) a congressman enjoys no absolute immunity outside that afforded by the Speech or Debate Clause (A. 38-40). The dissenting judge concluded that the doctrine of separation of powers required affirmance of the district court's action (A. 40).

Following rehearing en banc,[3] the court of appeals reversed the opinion and judgment of the panel in a 12-2

[3]In his petition for rehearing and rehearing en banc, defendant directed the court's inquiry only to the questions whether legislative immunity barred this action and whether a congressman's firing his secretary is a political question rendering the controversy nonjusticiable. (A. 41-42.)

decision, and affirmed in part and vacated in part the judgment of the district court. 571 F.2d 793 (A. 96-97). Addressing only the question whether plaintiff has an implied cause of action for money damages arising directly under the Fifth Amendment Due Process Clause, the majority held that this Court's holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was bottomed on federal common law and the cause of action there created was "not wholly of constitutional dimensions." (A. 47-48.)[4] The court then looked to the rules of "statutory implication" articulated in *Cort v. Ash*, 422 U.S. 66, 77-85 (1975)[5] to determine whether to imply a damage action of nonconstitutional dimension (A. 49-55), and, finding the *Cort* criteria unmet, held that there was no remedy in damages to vindicate the rights asserted. (A. 55-57.)

Specially concurring, Judge Jones expressed the view that the doctrine of separation of powers, operating through the Speech or Debate Clause of the Constitution, provided absolute immunity to defendant. (A. 57-59.) In a separate special concurrence, Judge Roney stated that in his view the *Bivens* rationale was premised on the nature of the personal right asserted, and that a constitutional cause of action for

[4]Bivens had claimed that his Fourth Amendment right to be secure against unreasonable search and seizure had been violated by agents of the Federal Bureau of Narcotics acting under color of federal authority, and that this unconstitutional conduct gave rise to a federal cause of action for money damages. This Court held, *inter alia*, that a private action for money damages arises directly under the Fourth Amendment. 403 U.S. at 389. *See* pp. 13-26, *infra*.

[5]In *Cort*, this Court addressed the question whether a cause of action for money damages could be implied under a federal statute, setting forth four criteria as a basis for making such determinations. *See* pp. 26-27, *infra*.

money damages should be implied only where the damage remedy is rooted in pre-constitutional notions of tort law. (A. 59-66.)

In dissent, Judge Goldberg, joined by Chief Judge Brown, concluded that *Bivens* was a decision of constitutional magnitude that mandated the implication of a cause of action here. (A. 69-82.) In his view, that decision held that the Constitution compels *some* remedy for a person whose constitutional rights have been violated. While Congress may by statute substitute remedies for a constitutionally-based cause of action, it may not eliminate all means of vindicating a federal constitutional right. (A. 94-95.) Judge Goldberg also concluded that a proper application of the four criteria in *Cort v. Ash* would justify implication of a cause of action for money damages on the facts of this case. (A. 73-74, 82-93.)

SUMMARY OF ARGUMENT

Defendant, while serving as a United States Congressman, dismissed plaintiff from her secretarial position solely and expressly on the basis of her sex. This conduct violated the equal protection component of the Fifth Amendment Due Process Clause. Plaintiff has requested money damages to redress this violation, invoking federal court relief through the implied cause of action recognized by this Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The en banc United States Court of Appeals for the Fifth Circuit held that plaintiff has no implied cause of action

under the Fifth Amendment.[6] In making this determination, the court (1) employed a standard never articulated by this Court in deciding that this action was not "constitutionally compelled" under this Court's decision in *Bivens*; (2) ignored the federal statute, 5 U.S.C. §7151, explicitly declaring sex discrimination by a congressman to be in violation of the policy of the United States; (3) inferred that Congress adversely decided this constitutional issue by not creating a statutory cause of action for this offense; and (4) incorrectly decided that docket considerations should control whether the Bill of Rights is enforceable in federal court.

The decision below would permit a United States Congressman deliberately to violate any employee's right to equal protection under the Due Process Clause of the Fifth Amendment. It would render congressional employees helpless to seek vindication of constitutionally guaranteed rights and thus leave them wholly vulnerable to discrimination based on race, sex, religion, or national origin. It would mean that members of Congress would be virtually the only employers in this country immune from the constitutional prohibition against such forms of discrimination.

The reasoning of *Bivens* controls this case. *Bivens* held that a violation of the Constitution gives rise to the presumption of a federal damage remedy, even where other remedies might exist. Because plaintiff here has no other

[6]This issue, on which the case was decided below, was not briefed before the panel, was conceded by defendant at oral argument before the panel, and was neither raised by defendant on rehearing nor briefed by him in that proceeding. (A. 41-42.) At oral argument before the panel, defendant's attorney conceded that *Bivens* controls this case:

> "Your honor, I acknowledge to the Court that if this Court should find that there is a federally constituted right then Bivens v. the seven narcotics folks does imply a right of action." (A. 29 n.18.)

remedy, *a fortiori*, a cause of action must be implied. Nine United States courts of appeals have applied *Bivens* to claims arising under constitutional provisions other than the Fourth Amendment, including the Fifth and Fourteenth Amendment Due Process Clauses. Nothing in the rationale of *Bivens* would limit its applicability to the Fourth Amendment or exempt members of Congress from its holding.

Congressional policy is affirmatively articulated in 5 U.S.C. §7151 and in the internal rules that expressly provide that members of Congress shall not discriminate against their employees on the basis of sex. Congressional mandate thus conforms with that of the Constitution. The court below erroneously ignored these specific congressional declarations, as well as the intent of the Framers in drafting the Bill of Rights. The only reason why this Court might decline to imply a *Bivens* cause of action would be the existence of a statutory scheme that provided an alternative, but equally effective, remedy. None exists.

Instead of following the "constitutional implication" doctrine established in *Bivens*, the court below relied on the four criteria articulated by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), for determining implication of causes of action from federal statutes. Although this is the wrong standard to apply to a constitutional claim, plaintiff in fact satisfies each *Cort* criterion and is entitled to an implied cause of action even under that more stringent test.

Since plaintiff has a private cause of action against defendant, the only remaining question is whether defendant has immunity from this suit by virtue of the protection accorded members of Congress under the Constitution.

The Speech or Debate Clause of the Constitution provides defendant with the only possible bar to trial on the merits. It protects members of Congress from suit for activities "within the legislative sphere." The history and plain meaning of the Clause, as well as applicable decisions by this Court, demonstrate that discharge of a secretary, who had no policy or legislative responsibility, does not fall within its ambit. Because the Clause was intended to guarantee the separation of powers essential to our tripartite system of government, there can be no reason for the judiciary to refrain from deciding this matter if that provision is inapplicable. Blatant discrimination, based on an impermissible criterion such as race or sex and contravening both the Constitution and national policy, warrants no such protection.

This suit should be remanded to the district court for trial.

ARGUMENT

I.

A CAUSE OF ACTION FOR MONEY DAMAGES IS PROPERLY IMPLIED DIRECTLY UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION.

A. It Must Be Taken As True That Defendant Fired Plaintiff Solely And Expressly On The Basis Of Her Sex.

This case arises on defendant's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In

deciding whether plaintiff has stated a claim upon which relief can be granted, all allegations of the complaint must be taken as true. *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976); *Radovich v. National Football League*, 352 U.S. 445, 448 (1957).

The controlling facts of this case are simple. Defendant fired plaintiff, who, in his own words, was an "extremely capable secretary,"[7] solely and expressly because he wanted a man rather than a woman to have that job. (A. 6-7.)

B. Employment Discrimination Based Solely On Sex By A Member Of Congress Violates The Equal Protection Component Of The Fifth Amendment Due Process Clause.

The Due Process Clause of the Fifth Amendment imposes an obligation on the federal government and its officials to afford equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954). This Court has established that, in order to support a valid equal protection claim, the complaint must allege intentional or purposeful discrimination based upon a scheme of classification. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Sex is, of course, one of the classifications granted equal protection scrutiny under the Fifth and Fourteenth Amendments. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190

[7]Should there be any question regarding plaintiff's tasks, she is prepared to prove at trial that her duties were solely secretarial and clerical in nature and were totally unrelated to defendant's legislative or policy-making activities.

(1976), *reh. denied*, 429 U.S. 1124 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, *reh. denied*, 420 U.S. 966 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

In the instant case, plaintiff has clearly alleged intentional discrimination based on the classification of sex. Defendant's letter terminating her employment solely because he wanted a man for the job can be interpreted no other way. (A. 6-7.)

The precise standard for determining whether conduct violates the equal protection clause remains unsettled. *Craig v. Boren, supra*, 429 U.S. at 210-11 & n.* (Powell, J., concurring). In *Reed*, this Court suggested a "minimum rationality" test, and in *Frontiero* it articulated a "suspect classification" test requiring stricter scrutiny. In *Craig* and *Goldfarb*, the Court seemingly resolved this matter in favor of "middle-level" equal protection scrutiny: "classification by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives." *Craig v. Boren, supra*, 429 U.S. at 197 (emphasis added). It makes no difference which test is applied in the instant case. Not only has defendant thus far failed to allege any governmental interest at all, but also no governmental interest sufficient to justify distinguishing between male and female clerical personnel could be advanced to satisfy even the least stringent standard.

C. *Bivens* Compels Implication Of A Cause Of Action For Money Damages On The Facts Of This Case.

This case is controlled by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*"), in which this Court decided that a cause of action for money damages is properly implied under the Fourth Amendment to the United States Constitution. Bivens sued agents of the Federal Bureau of Narcotics for money damages in federal court following an arrest and search not supported by either warrant or probable cause. Rejecting the argument of the government that Bivens had to be relegated to a tort action in state court, this Court held (1) a private action for money damages arises directly under the Fourth Amendment, 403 U.S. at 389; (2) the federal claim based upon unconstitutional conduct by a federal agent is independent of a state tort claim which might be raised, *id.* 394-95; and (3) money damages are a "remedial mechanism normally available in the federal courts," *id.* at 397.

Without a private cause of action, the Court concluded the Bill of Rights would be rendered meaningless and the petitioner left without remedy for invasion of constitutionally protected interests. Indeed, since the decision of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), this Court has recognized that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[8] The Court then implied a

[8] *See also* Examining Board of Engineers, Architects and Surveyors v. Otero, 426 U.S. 572, 586 (1976).

damage remedy upon the authority of *Bell v. Hood*, 327 U.S. 678, 684 (1946):

> "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Neither the language nor the rationale of *Bivens* limits its application to Fourth Amendment violations or excludes federal legislators.

1. The Opinion Below Is Inconsistent With *Bivens*.

a. *Bivens* held that a violation of the Constitution gives rise to the presumption of a private cause of action.

The court below held the cause of action created in *Bivens* to be "not wholly of constitutional dimensions" (A. 47-48) and therefore the *Bivens* remedy "to be one implied as a matter of federal common law . . . ." (A. 49.) This conclusion, virtually barren of analysis, seems to be predicated on the fact that this Court in *Bivens* noted the absence of any congressionally-created remedy for the violation alleged in deciding that a cause of action arose directly under the Fourth Amendment. The court below then looked to the jurisprudence of statutory implication to determine whether to imply a damage action of nonconstitutional dimensions. (A. 49.)

The *Bivens* majority expressly rejected the approach adopted by the court below. In implying a cause of action

directly under the Fourth Amendment, this Court refused to accept the contention that the Fourth Amendment was limited to a defense to be asserted in a state tort suit because it would have "unduly restrict[ed] the Fourth Amendment" and the protections afforded thereunder.[9] *Bivens, supra*, 403 U.S. at 391. The Court made clear that, regardless of a state claim which might be asserted, and regardless of the adequacy of that remedy to the case at bar, the federal claim was independent of any state law claim, and "sufficient to make out the [petitioner's] cause of action." *Id.* at 395.

Although the Court implied that its *choice* of federal remedy might be affected by "affirmative action by Congress," *id.* at 396, it did not suggest that Congress could either deny the presumed availability of a cause of action or declare that no remedy may be provided for a constitutional violation. Congress could, by statute, only dictate *which* remedy, among equally effective alternatives, a court should employ.

This conclusion is underscored by the concurring opinion of Justice Harlan. Justice Harlan provided an analytical framework for the *Bivens* decision and its subsequent application and made irrefutable the conclusion that a cause of action must be implied under the Fifth Amendment as well as the Fourth.

Justice Harlan determined that it was the nature of the legal interest, rather than the nature of the remedy, which determined whether courts could award damages for violation of "constitutionally protected interests." *Bivens,*

---

[9]It must be emphasized that respondents in *Bivens* never argued, as does defendant in the instant case, that *Bivens* should be left entirely without remedy for unconstitutional invasion of his rights by the federal agents. Rather, they asserted that he should be relegated to a claim for money damages in the state courts.

supra, 403 U.S. at 399. Justice Harlan did not distinguish among various constitutional rights. Rather, he looked only to the "range of policy considerations" which might affect the appropriateness of implying a damage remedy,[10] *id.* at 407, and specifically counselled the judiciary against making comparisons among various legally protected interests, *id.* at 410-11. That Congress had not spoken on the issue was no bar to vindication of constitutional rights.

The conclusion of the court below that some congressional activity in an area negates the presumptive availability of an implied cause of action under the Constitution is simply erroneous. Even were a federal statutory remedy or a state court remedy available to plaintiff, *Bivens* made clear that an implied constitutional cause of action in damages exists to remedy invasions of "personal interests in liberty."

b. *Bivens* held that a remedy in money damages need not be "indispensable" for a private cause of action to be implied.

The en banc majority's inquiries "whether the Constitution . . . *compels* an action for money damages implied from the Fifth Amendment Due Process Clause" (A. 49)

[10]It "would be at least anomalous to conclude that the federal judiciary — while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution . . . — is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens, supra*, 403 U.S. at 403-04 (citations omitted) (Harlan, J., concurring).

and "whether, in this case, a damage action is *indispensable* to [its] effectuation" (A. 55) (emphasis added) are in direct conflict with the standard articulated in *Bivens*.

In determining that a cause of action for money damages was implied under the Fourth Amendment, the Court expressly rejected the contention that an implied federal remedy in money damages be "necessary to enforce the Fourth Amendment." *Id.* at 397. The court ruled that a remedy in money damages need not be essential or indispensable or even "necessary" to effectuate constitutional rights generally:

> "[W]e cannot accept respondent's formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment . . . . The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts . . . ." *Id.* at 397.

The Court buttressed this conclusion by noting that there was "no *explicit* congressional declaration" that persons so injured were *not* to recover damages, and suggested that any such affirmative congressional action would be constitutional only if an alternative "but . . . equally effective" remedy to redress violations of constitutional rights were provided. *Id.* at 397 (emphasis added).

The Court determined that an award of damages obtained for injuries violating the Fourth Amendment was both appropriate and "hardly . . . surprising." *Id.* at 395. Even though the Fourth Amendment does not precisely provide for its enforcement by award of money damages, the fact that damages have been historically regarded as the

"ordinary remedy" for this type of invasion, *id.*, and the fact that 28 U.S.C. §1331(a) provides a "general right to sue for such invasion," empowers the federal courts to "use any available remedy to make good the wrong done." *Id.* at 396.[11]

Justice Harlan reiterated this point. Having concluded that federal courts are empowered by 28 U.S.C. §1331(a) to grant damages, a traditional remedy at law, *id.* at 405-06, he then stated that the exercise of that power should depend on the "appropriate[ness]" of granting compensatory relief to remedy the injury. 403 U.S. at 407.

Justice Harlan did note that in some cases the appropriateness of money damages might vary with the nature of the personal interest asserted, *id.* at 409 n.9. He concluded, however, that

> ". . . some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court . . . . *For people in Bivens' shoes, it is damages or nothing.*" *Id.* at 409-10. (emphasis added.)

In plaintiff's case, a cause of action is clearly "appropriate," and indeed even "necessary," to vindicate her Fifth Amendment rights. She has no other remedy. Under *Bivens*, however, she need not even meet that exacting

[11]Section 1331(a) of Title 28 of the United States Code provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . ."

standard.[12] She can "demonstrate an injury consequent upon the violation by federal agents of [her Fifth] Amendment rights. [She] is entitled to redress [them] through a particular remedial mechanism normally available in the federal courts." *Id.* at 397.

c. If a cause of action was implied in *Bivens*, where an adequate state remedy existed, *a fortiori* one must be implied here where there is no other remedy.

The facts argue even more strongly for a judicially created remedy in the instant case than in *Bivens*. There, the petitioner could have brought a tort action in state court against the federal agents who had infringed his Fourth Amendment rights. Plaintiff in this case has no cause of action under Louisiana law,[13] and she is foreclosed from equitable relief because defendant is no longer in office.[14] Her only means of vindicating her constitutional right is an

[12]Instead of looking to the "constitutional implication" criteria enumerated in *Bivens* for implication of a damages remedy, the court below relied heavily on the "statutory implication" criteria enumerated by this Court in Cort v. Ash, 422 U.S. 66 (1975), for implication of a cause of action under a federal statute. *See* pp. 26-49, *infra.* Although those more stringent criteria would still warrant implying a cause of action on the facts of this case, the court below erred in its choice of precedent.

See Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1551 (1972).

[13]The state court would have no authority to render relief against a United States Congressman. *See* Tarble's Case, 13 Wall 397 (1892). *Cf.* Testa v. Katt, 330 U.S. 386 (1947).

[14]*See* p. 4 & n.2, *supra.*

action for money damages arising directly under the Fifth Amendment. Implication of a cause of action, then, is particularly appropriate.

2. Nine Courts Of Appeals Have Applied *Bivens* To Constitutional Provisions Other Than The Fourth Amendment, And None Has Agreed With The Opinion Below.

These are precisely the considerations that have prompted nine courts of appeals to apply *Bivens* to claims arising under constitutional provisions other than the Fourth Amendment and to imply causes of action directly from them. Five circuits have specifically applied the *Bivens* rationale to actions arising under the due process provisions of either the Fifth or Fourteenth Amendments,[15]

[15]Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1364 (9th Cir. 1978), *amending on denial of rehearing*, 558 F.2d 928 (9th Cir. 1977) (Fifth Amendment); Gentile v. Wallen, 562 F.2d 193, 196-97 (2d Cir. 1977) (Fourteenth Amendment); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (Fifth Amendment) ("[N]othing said in *Bivens* would limit the application of the principles enunciated therein..."); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892, 893-94 (3d Cir. 1972) (Fifth Amendment Due Process and Fourth Amendment) ("[*Bivens*] recognizes a cause of action for damages for violation of constitutionally protected interests, and is not limited to Fourth Amendment violations."). The Eighth Circuit's determination that a cause of action is implied under the Fourteenth Amendment and that a municipality may be sued for money damages under a vicarious liability theory, Owen v. City of Independence, 560 F.2d 925, 932-34 (8th Cir. 1977), was recently vacated and remanded for further consideration, 98 S. Ct. 3118 (1978), in light of this Court's holding that a municipality cannot be subjected to liability under a respondeat superior theory in Monell v. New York City Dept. of Social Services, 98 S. Ct. 2018 (1978). *See* n. 35, *infra*. *See*

(continued)

two of them subsequent to the decision below.[16] These courts have concluded that "the due process rights protected by the Fifth Amendment are as fundamental as those protected by the Fourth Amendment," and that "[n]othing in *Bivens* warrants limitation to Fourth Amendment claims . . . ." *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1364 (9th Cir. 1978), *amending on denial of rehearing*, 558 F.2d 928 (9th Cir. 1977). "*Bivens*, if anything, established that damages could flow from injuries caused by an invasion of other constitutional provisions." *Turpin v. Mailet*, 579 F.2d 152, 157 (2d Cir. 1978) (en banc). The courts that have applied *Bivens* to claims arising under other constitutional provisions[17] have been unwilling to conclude, as the court

(footnote continued from preceding page)

also Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) (Fourth and Fifth Amendments). *Cf.* Bennett v. Campbell, 564 F.2d 329, 331-32 (9th Cir. 1977) (reversing denial of motion to amend complaint in order to permit assertion of *Bivens* claims under Fourth and Fifth Amendments); Gray v. Union County Intermediate Education District, 520 F.2d 803, 805 (9th Cir. 1975) (assuming availability of cause of action for back pay and damages for violation of First Amendment and due process rights).

[16]Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978); Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc). *See* Jones v. City of Memphis, No. 77-1704 (6th Cir. Sept. 19, 1978) (slip op. at 3) (reiterating availability of implied cause of action under Fourteenth Amendment; holding limited to respondeat superior liability of municipality).

[17]Four other circuits have either applied *Bivens* to claims arising under constitutional amendments other than the Fourth, Fifth, or Fourteenth or have indicated their willingness to do so. The District of Columbia and Sixth Circuits have not yet confronted the due process question, but both courts have applied the *Bivens* rationale to First Amendment actions. *See* Dellums v. Powell, 566 F.2d 167, 194-95

(continued)

below would do, that one constitutional right deserves

(footnote continued from preceding page)

(D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 3146 (1978); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392, 1393 (6th Cir. 1975). The Third Circuit has also upheld a cause of action under the First Amendment. *See* Paton v. La Prade, 524 F.2d 862, 870 (3d Cir. 1975). *See also* Payne v. District of Columbia, 559 F.2d 809, 818-19 & nn.49-50 (D.C. Cir. 1977) (Fifth Amendment jurisdiction, recognizing availability of cause of action); Sullivan v. Murphy, 478 F.2d 938, 965 & n.47 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973) (Fourth and Fifth Amendment jurisdiction, stating availability of cause of action). The Seventh and Tenth Circuits have not yet directly confronted the question of implying causes of action under amendments other than the Fourth, but both have indicated their willingness to do so. *See* McDonald v. Illinois, 557 F.2d 596, 604 (7th Cir.), *cert. denied*, 98 S. Ct. 508 (1977) (denying relief on vicarious liability theory but stating, "A cause of action (without benefit of 42 U.S.C. §1983) may be implied in favor of one who suffers injuries as a result of a government agent's violation of the Constitution"); Cannon v. University of Chicago, 559 F.2d 1063, 1082 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 3142 (1978) (denying implied remedy under a federal statute but indicating result would have differed had case involved a fundamental constitutional right for which Congress had provided no remedy); Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 718 n.7 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976) (suggesting availability of cause of action under Fourteenth Amendment); Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 576-77 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) (Fourteenth Amendment due process jurisdiction, implying availability of cause of action); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931-32 & n.5 (10th Cir. 1975) (equal protection and due process jurisdiction, presuming availability of cause of action) (Bell v. Hood, *supra*, and *Bivens* "did not limit a constitutional action to a Fourth Amendment violation ...").

The Fifth Circuit, prior to its en banc decision in plaintiff's case, had found jurisdiction present where *Bivens*-type actions were brought under constitutional provisions other than the Fourth Amendment. (A. 47.) *See* Reeves v. City of Jackson, 532 F.2d 491 (5th Cir. 1976) (suggesting availability of cause of action under Eighth Amendment and/or Fourteenth Amendment, granting jurisdiction); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976) (Fifth Amendment jurisdiction); *see also*

(continued)

greater or less protection than another.[18]

(footnote continued from preceding page)

Roane v. Callisburg Independent School District, 511 F.2d 633, 635 n.1 (5th Cir. 1975); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 801-02 n.2 (5th Cir. 1974); Traylor v. City of Amarillo, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974). *But see* Rodriguez v. Ritchey, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 894 (1978) (declining to address *Bivens* issue).

The one remaining court of appeals — the First Circuit — has refused to imply a cause of action against a municipality under the Fourteenth Amendment. Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977). However, as Judge Goldberg noted in his dissent below, (A. 90), that case involved a municipal "deep pocket defendant," sued under a vicarious liability theory. The First Circuit held that plaintiff could maintain an action under 42 U.S.C. §1983 against those persons directly responsible for his injuries and rested its decision on the adequacy of that remedy. (This situation will no longer arise, given this Court's recent decision in Monell v. New York City Dept. of Social Services, *supra*. *See* n.35, *infra*.)

These are not all of the cases in which courts of appeals have touched upon the *Bivens* issue. Rather, these are the cases that have addressed the *Bivens* question most directly. An overwhelming number of district courts have also applied the *Bivens* rationale to claims arising under constitutional provisions other than the Fourth Amendment. *See, e.g.*, Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974) ("*Bivens* recognizes a cause of action for damages for violations of any constitutionally protected interest"); Rodriguez v. Barcelo, 358 F. Supp. 43, 48 (D.P.R. 1973) ("if [defendants] are federal employees, then, under *Bivens*, there is an action whenever a federally guaranteed right is violated"); Washington v. Brantley, 353 F. Supp. 559, 563-64 (M.D. Fla. 1972) ("*Bivens* recognizes a cause of action for *any* constitutionally protected interest"). *See also* Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975) (First and Fourteenth Amendments); Peacock v. Board of Regents, 380 F. Supp. 1081 (D. Ariz. 1974), *aff'd*, 510 F.2d 1324 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975) (First Amendment); Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973) (Eighth Amendment); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973) (First, Fourth and Fifth Amendments).

[18]The Third Circuit considered the "linguistic difference" between the Fourth and First Amendments in holding that a *Bivens* cause of

(continued)

In applying *Bivens* to a Fourteenth Amendment claim against a municipality, the en banc Second Circuit stated that in implying a remedy the court was doing nothing more than fulfilling its traditional common law function. The criteria used to make that determination were those articulated in *Bivens*, rather than those identified in *Cort v. Ash*, 422 U.S. 66 (1975), and erroneously applied in the instant case by the court below. The Second Circuit concluded that it need only determine whether the remedy requested is "appropriate" to the vindication of the right asserted. "When one analyzes *Bivens*, he is driven to the conclusion that *Bivens* decided that precise issue. The Court refused to accept the premise that a remedy must be necessary or indispensable to warrant its implication." *Turpin v. Mailet, supra*, 579 F.2d at 157.

A remedy in money damages is "appropriate" to redress plaintiff's constitutional rights in the instant case. As Justice Harlan concluded, "For people in [plaintiff's] shoes, it is damages or nothing." 403 U.S. at 410.

3. *Bivens* Applies To Members Of Congress In The Same Way It Applies To All Other Federal Officials.

Nothing in *Bivens* limits its application to agents of the Federal Bureau of Narcotics or executive branch officials

(footnote continued from preceding page)
action was implied under the latter. Paton v. La Prade, 524 F.2d 862, 869 (3d Cir. 1975). Although the Fourth Amendment — like the Fifth — is addressed to the rights of citizens, the First is expressed as a limitation on Congress. Nonetheless, the rights were deemed equally "personal" to an individual, and money damages were therefore an appropriate remedy for their invasion. *Id.* This Court need not address that issue in the present case.

generally. The core issue in *Bivens* was not the nature of the office of the defendant, but rather the nature of the right asserted by the plaintiff. This Court's analysis is applicable to any federal officer.[19]

In rejecting the argument that the Fourth Amendment established no different relation between the parties than had both been private citizens, this Court rested its conclusion on the broad ground that "power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 391-92.

A member of Congress, like an executive branch official, acts "in the name of the United States." Abuse of power — unconstitutional sex discrimination — by a member of Congress carries with it far greater potential for injury than does the same activity by a private individual.[20] When federal power has been used in an impermissible, indeed *ultra vires*, fashion, a federal remedy must be provided to redress the wrong done.

The Constitution does not provide members of Congress with greater or different rights than any individual or any other federal official. Members of Congress swear to

[19]It would be anomalous to hold otherwise. A private cause of action against all state officials for invasion of constitutional rights exists under 42 U.S.C. §1983. This provision includes state legislators as well as state executive branch officials. *Bivens* must be read to reach the same result for all officers of the federal government. See pp. 39-41, *infra*.

[20]Such discrimination by a private employer would in most cases subject the offending individual to a private suit for damages in federal court. Plaintiff has no such remedy here.

"protect and defend" the Constitution, 5 U.S.C. §3331, and have never been deemed to stand above the law they create. *Gravel v. United States*, 408 U.S. 606, 615 (1972). The Constitution does provide members of Congress *immunity* from suit if the challenged activity falls within the ambit of the Speech or Debate Clause, art. 1, §6, but the question whether such immunity is available to defendant in the instant case is entirely separate from whether a *Bivens* cause of action is available to a plaintiff. *See* pp. 50-68, *infra*.[21] No court has premised implication of a *Bivens* remedy upon the office of the defendant and there is no reason to do so now.

D. Although The "Statutory Implication" Criteria Articulated By This Court In *Cort v. Ash* Are Inapplicable In A Case Involving A Violation Of The Constitution, The Instant Case Nonetheless Satisfies Each Of Those Criteria.

The court below erroneously applied the "statutory implication" criteria articulated in *Cort v. Ash*, 422 U.S. 66 (1975), rather than the "constitutional implication" criteria articulated in *Bivens*. This in itself is sufficient grounds to reverse the lower court decision and remand the case for trial on the merits.

Even if the more stringent *Cort* criteria were deemed to be relevant in the instant case, however, a private cause of action would nonetheless properly be implied. In *Cort*, this

[21]The *Bivens* Court did not consider whether respondents were immune from liability by virtue of their official position. *Bivens, supra*, 403 U.S. at 397-98.

Court declined to imply a stockholders' derivative suit for money damages from a criminal statute which was not designed to define the internal relationships between corporations and stockholders. *Id.* at 78-82. In so deciding, the Court articulated four criteria "relevant" to making this determination:

(1) Is the plaintiff "one of the class for whose *especial* benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the plaintiff;"
(2) Is there indication of legislative intent to create or deny a remedy;
(3) Is implication of a remedy consistent with the underlying purposes of the legislative scheme; and
(4) Is the cause of action traditionally relegated to state law in an area basically the concern of the state so that it would be "inappropriate" to infer a cause of action based solely on federal law.

Plaintiff satisfies each criterion in the instant case.

1. Plaintiff Is One Of The Class For Whom The Fifth Amendment Was Enacted.

A federal right exists in the plaintiff. Thus, the first *Cort* standard, which has been "central to all implication cases, from the first statutory implication decision in which it was originally formulated, *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916), through to *Bivens* and more recent statutory cases" (A. 83), is satisfied.

Cort confirmed that "in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated

federal right in the plaintiff, . . .*or* a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," 422 U.S. at 82 (citations omitted) (emphasis added).

The court below acknowledged that the Fifth Amendment Due Process Clause "certainly confers a right upon Davis" (A. 50), but then erroneously concluded that infringement of this right must, if a cause of action is to be implied, somehow be as "direct" as that to Bivens' Fourth Amendment rights.[22] *Id.* The equal protection component of the Fifth Amendment guarantees petitioner the "absolute right" to be free from unconstitutional sex discrimination carried out by virtue of federal authority to the same extent the Fourth Amendment guaranteed Bivens the "absolute right to be free from unreasonable search and seizures carried out by virtue of federal authority," *Bivens, supra*, 403 U.S. at 392. Neither right can be regarded as more important or more jealously to be guarded.

The Bill of Rights was enacted expressly for the purpose of protecting citizens from the unwarranted exercise of federal authority. Its terms confer an "especial" right in the plaintiff as required by *Cort, supra*, 422 U.S. at 78, 82. That *Cort* relies on *Bivens* as precedent for this paramount criterion in the implication of damage remedies from federal statutes demonstrates that causes of action are particularly appropriate in the case of violations of constitutionally protected interests.

[22]If the court below meant to suggest some kind of distinction between physical and nonphysical intrusions, that distinction is incorrect. Although this Court once distinguished Fourth Amendment violations on that basis, that line of cases has been overruled. Katz v. United States, 389 U.S. 347 (1967); Silverman v. United States, 365 U.S. 505 (1961).

2. The "Legislative Intent" Of The Framers Supports Implication Of A Cause Of Action Here.

The intent of the Framers of the Fifth Amendment supports the implication of a cause of action here. In considering the "legislative intent" criterion articulated in *Cort v. Ash* for implication of remedies from federal statutes, the court below erred in relying on what it perceived to be the congressional intent manifested in the enactment of subsequent legislation.

"Legislative intent" either to create or to deny a remedy, 422 U.S. at 82-84, or to reveal the purposes of the legislative scheme, *id.* at 84, simply does not exist with respect to the provisions of the Constitution.[23] There is no specific, contemporary legislative history surrounding the adoption of the Fifth Amendment. *See Cort v. Ash, supra*, 422 U.S. at 82, 83.

To look to statutory schemes subsequently enacted, and thus to divine "congressional intent" respecting the Fifth Amendment from the remedial mechanisms provided by those statutes, as the court below would do, is to subvert the underlying purposes of the Amendment and the intent of the

[23]It would, moreover, be particularly anomalous to impose, as the court below would do, a more stringent standard for implication of causes of action from constitutional provisions than that for implication from federal statutes.

> ". . . the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes." *Bivens, supra*, 403 U.S. at 407 (Harlan, J., concurring.)

Framers in enacting it. Indeed, that statutory inquiry is "simply irrelevant" where no alternative remedy has been made available.[24] (A. 78; Goldberg, J., dissenting.) "There is *no* suggestion in *Bivens* that Congress can negate the existence of *every* remedy which might vindicate a constitutional right." (A. 85; Goldberg, J., dissenting) (emphasis in original).[25]

The only truly relevant "legislative history" is the intent of the Framers of the Fifth Amendment. The court below, in denying plaintiff a cause of action for redress of constitutional violations, failed even to consider the intent of the Framers in enacting the Bill of Rights. Unquestionably, however, the Framers did not intend that the Bill of Rights establish rights with no remedies.[26]

[24]Even if Congress had enacted some kind of remedial scheme, plaintiff would still have an implied cause of action directly under the Constitution. The court would then be guided, in deciding whether to recognize a constitutionally based damage remedy, by *this* expression of legislative intent. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-417 (1968) (enactment of Civil Rights Act of 1964 providing certain remedies had no bearing upon litigation under 42 U.S.C. §1982).

[25]Moreover, no such negative intent need be imputed to Congress.

> "[T]he traditional deference of Congress to the Supreme Court in safeguarding individual liberties makes it both less likely that Congress will act affirmatively to implement the Bill of Rights, and improbable that congressional silence indicates a desire to retain state law."

Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 18-19 (1975).

See also Examining Board of Engineers, Architects and Surveyors v. Otero, 426 U.S. 572, 590 (1976): ". . . Congress appears to have left the question of the personal rights to be accorded [appellees] to orderly development by this Court and to whatever further provision Congress itself might make for them.

[26]This Court has declined to limit the applicability of 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), in cases

(continued)

The first ten amendments to the Constitution were enacted for the very purpose of preventing encroachment upon individual rights by the federal government, and especially by the legislative branch.[27] By incorporating them into the Constitution rather than leaving their codification to state governments,[28] the Framers sought to

(footnote continued from preceding page)

of deprivation of constitutional rights by persons acting under color of Puerto Rico territorial law. Examining Board of Engineers, Architects and Surveyors v. Otero, *supra.* The Court held that to so decide would mean that "Congress, although providing rights and remedies, could be said to have failed to provide a means for their enforcement." 426 U.S. at 586. The case for judicial enforcement is even stronger when the Bill of Rights is involved.

[27]"[T]he great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights . . . ." 1 *Annals of Cong.* 450 (Gales & Seaton eds. 1789) (hereinafter "*Annals*"). (James Madison before the 1st Congress, 1st Session.) Conferring far-reaching powers upon the federal government was perceived as a grave danger by many Americans who viewed state governments as the defenders of popular liberty and the proper repositories of the great powers of government. Nearly all of the state ratifying conventions passed resolutions recommending amendments guaranteeing various rights against infringement by federal authority. From these resolutions, James Madison drafted the bill he presented to Congress on June 8, 1791.

In presenting the Bill of Rights to Congress, Madison stated:

> "In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker. *It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control.*" *Annals* at 454 (emphasis added).

[28]Madison observed that leaving fundamental guarantees of the Bill of Rights to the idiosyncracies of state governments was "too uncertain ground to leave this provision upon . . . ." *Annals* at 456.

ensure that the judiciary would defend the Bill of Rights guarantees. Madison said:

> "If [these rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[29]

The court below erred by failing to recognize the mandate of the Framers to check the exercise of power by the federal legislature. *See Bivens, supra*, 403 U.S. at 392.

3. The Underlying Purpose Of The Fifth Amendment Supports Implication Of A Private Cause Of Action Here.

Since an implied cause of action is consistent with the underlying purpose of the Fifth Amendment, this case also satisfies the third *Cort* criterion.

The importance of the Fifth Amendment in protecting individual rights is readily apparent.[30] Without a means of enforcing them, however, the Fifth Amendment guarantees become only an exhortation which may be discarded at will. Implication of a private cause of action to enforce the Fifth Amendment is therefore entirely consistent with its under-

[29] *Annals* at 457.

[30] Courts of appeals have expressly distinguished interests protected by the Constitution from those protected by common law. *E.g.*, Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 566 F.2d 289, 294 (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 3144 (1978), citing *Bivens*. *See also* Butz v. Economou, 98 S.Ct. 2894, 2905 n.22 (1978) (holding expressly limited to constitutional contentions).

lying purpose. As this Court observed in *Bivens*, "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395. In the instant case, indeed, a private cause of action is the *only* means of implementing the intent of the Fifth Amendment.[31]

The court below never specifically stated why a remedy in money damages is not consistent with the underlying purpose of the Fifth Amendment, or why such a remedy should not be implied on these facts.[32] Instead, it concluded that the potential number of cases that might be generated was sufficiently troublesome to preclude finding a cause of action for violation of plaintiff's constitutional rights. This approach conflicts with the purpose of the Fifth Amendment.

In erroneously relying on docket considerations, the court below gave short shrift to the expertise of the federal courts in determining when cases are appropriately relegated to state tribunals, when constitutional claims have been adequately stated, and when facially adequate claims may be disposed of before trial. None of these reasons comports with the third criterion articulated by this Court in *Cort*.

[31] Congress has taken *Bivens* to be law and expanded it by enacting a statutory "counterpart". The 1974 amendment to the Federal Tort Claims Act, 28 U.S.C. § § 1346(b), 2680(h), provided a cause of action against the United States for certain intentional torts of federal investigative and law enforcement officers. A *Bivens* action already existed against the offending officials themselves. S. Rep. No. 588, 93rd Cong., 1st Sess. 2-3 (1973).

[32] The court ignored the teachings of other federal courts which, in making this determination, had looked to the standard in 42 U.S.C. § 1983 since a "*Bivens*-type cause of action is the federal counterpart to claims under [that statute]." Paton v. La Prade, 524 F.2d 862, 871 (3rd Cir. 1975). *See* pp. 39-41, *infra*.

4. Plaintiff's Claim Here Raises Traditional Federal Issues And Is Not A State Concern Controlled By State Law.

Plaintiff's claim here asserts a right that is traditionally federal and that is not so basically the concern of the state that it would be "inappropriate" to infer a cause of action based solely on federal law. 422 U.S. at 78. Thus, the fourth *Cort* criterion is satisfied, and a federal cause of action is properly implied.[33] *Cort* looked to *Bivens* as authority for this proposition, *id. Bivens* thoroughly considered the appropriateness and the adequacy of relegating federal constitutional claims to state courts and rejected that approach because of the vagaries and limitations of state law. *Bivens, supra,* 403 U.S. at 394-395; *id.* at 400 (Harlan, J., concurring).

The instant case involves blatant sex discrimination by a United States Congressman, violative of the Constitution. Surely there could be no more peculiarly "federal" concern, nor a more "federal" cause of action which would require determination of federal constitutional principles.[34]

[33]The "statutory implication" standard first articulated in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), was whether a remedy is "necessary" and "appropriat[e]," 377 U.S. at 433, 434, to effectuate the federal statute. In *Bivens,* this Court declined to require that the "constitutional implication" standard be whether the remedy was "necessary to enforce the Fourth Amendment." 403 U.S. at 397. This Court articulated the current "statutory implication" standard in *Cort:* the remedy must be consistent with the purpose of the legislation and not "inappropriate" as a basis for a federal cause of action. 422 U.S. at 78.

[34]The elimination of the jurisdictional amount requirement for certain suits against the United States is another indication of congressional intent that federal claims be heard and remedied in the federal forum. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13-17 (1976).

Although the court below acknowledged that "the particular circumstances of the case at bar raise questions of federal rights in federal employment" (A. 54), it concluded that docket control of the federal judiciary warranted refusal to imply a cause of action for damages. (A. 54-55.) The specter of federal court jurisdiction over "every legally cognizable tortious injury inflicted by persons acting under color of federal law" led the court below to the erroneous determination that even those litigants who have no other remedy should be barred from relief in federal court. *See Bivens, supra,* 403 U.S. at 410-11 (Harlan, J., concurring).

In the seven years since *Bivens* was decided, many federal courts have applied *Bivens* to causes of action arising from both Fifth and Fourteenth Amendment violations[35] as well as those arising under other amendments. *See* pp. 20-24 and nn. 15-17, *supra.* The "avalanche," which also concerned the dissenting Justices in *Bivens,* 403 U.S. at 428, 430, has

[35]Fourteenth Amendment *Bivens* actions have frequently been implied against municipalities or other agencies of local government that were previously held not to be "persons" in Monroe v. Pape, 365 U.S. 167 (1961), and therefore were not subject to suit under 42 U.S.C. § 1983. This Court assumed, without deciding, that this implication was appropriate. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 278 (1977).

Implication of such causes of action will no longer be necessary because this Court in Monell v. New York City Dept. of Social Services, 98 S.Ct. 2018 (1978), recently overruled that aspect of Monroe v. Pape, *supra. Monell* permits suits under 42 U.S.C. § 1983 against municipalities, except those based on vicarious liability theories, for alleged unconstitutional actions implementing government policy or custom. This decision eliminates the need to bring *Bivens* claims under the Fourteenth Amendment that would previously not have been cognizable under 42 U.S.C. § 1983. Thus the fear of the court below, insofar as it concerned an increased number of Fourteenth Amendment claims (A. 54, 55), is groundless. *See also Bivens, supra,* 403 U.S. at 391 n.4.

not materialized. The cases decided under these causes of action have vindicated the federal civil rights of the litigants without unduly burdening the federal forum.

Because of their vast experience in equal protection litigation, federal civil rights actions, and federal employment discrimination suits, the federal courts are particularly qualified to decide this kind of question. Frivolous and immaterial cases can be decided by either motions to dismiss or summary judgment. *Bell v. Hood,* 327 U.S. 678, 682 (1946); *Bivens, supra,* 403 U.S. at 391, 410-411. The Court should not presume that members of Congress will disregard their constitutional obligations. Only those relatively few cases that are truly meritorious will and properly should draw upon the time and resources of the federal judiciary.

To the extent the defenses of a member of Congress must be analyzed for immunity or liability purposes, that analysis is best undertaken in a federal context. *Bivens, supra,* 403 U.S. at 409 (Harlan, J., concurring). The federal court is the only "appropriate" forum for the resolution of these issues. The citation to *Bivens* in *Cort,* 422 U.S. at 78, is persuasive authority for this proposition.

E. Although "Congressional Intent" As Determined By Subsequent Enactment Of Legislation Is Irrelevant In Determining Whether A Private Cause Of Action Exists Under The Constitution, Congress Has In Fact Made Clear Its Policy Prohibiting Sex Discrimination By Its Members.

It is the intent of the Framers of the Constitution that must control in determining whether a private damage action is

implied under the Fifth Amendment in this case. *See* pp. 29-32, *supra*, and *Bivens, supra,* 403 U.S. at 396. The court below thus erred in relying upon its interpretation of the intent reflected in more recent statutes.

The error of the lower court is compounded by its failure to consider the statutes most directly on point. Those establish a clear congressional policy against sex discrimination by a member of Congress and are entirely consistent with the implication of a private cause of action in this case.

1. 5 U.S.C. § 7151 Prohibits Sex Discrimination By A Member Of Congress.

The policy of Congress with respect to discrimination is unambiguously enunciated in 5 U.S.C. § 7151:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, *sex,* or national origin" (emphasis added).

This provision, enacted in 1966,[36] applies to all federal government "employees," including employees of Congress, except the military.[37] Defendant's conduct in this case directly contravenes this statutory policy.

---

[36]Pub. L. No. 89-554, 80 Stat. 523.

[37]The term "employee" as used in 5 U.S.C. §7151 is defined in 5 U.S.C. §2105(a)(1)(B) to mean:

> "... an individual who is — (1) appointed in the civil service by one of the following acting in an official capacity —
>
> * * *
>
> (B) a Member or Members of Congress, or the Congress . . . ."

In turn, 5 U.S.C. §2101(1) defines the term "civil service" as used in 5 U.S.C. §2105(a)(1) to include:

> ". . . all appointive positions in the executive, judicial, and legislative branches of the Government of the United States . . ."

2. House Rule XLIII And Senate Rule L(50) Prohibit Sex Discrimination By A Member of Congress.

Both houses of Congress have passed rules, binding on their members, that prohibit sex discrimination.[38] House Rule XLIII, § 9 provides:

> "A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex* or national origin." (emphasis added.)

Senate Rule L(50) provides:

> "[N]o Member, officer, or employee of the Senate shall, with respect to employment by the Senate, or any office thereof — fail or refuse to hire an individual; discharge an individual; or otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of such individual's race, color, religion, *sex*, national origin, age, or state of physical handicap." (emphasis added.)

Defendant's action in discharging plaintiff expressly and solely on the basis of her sex also directly contravenes the Rules of the House of Representatives.

---

[38]Neither branch has passed a resolution implementing these rules. Efforts to do so have uniformly failed. *See* Reply and Supplemental Reply of Petitioner on Petition for Writ of Certiorari for documentation and analysis of these defunct resolutions.

3. The Decision Of The Court Below Contravenes Congressional Intent Reflected In The Enactment Of 42 U.S.C. § 1983 And 28 U.S.C. § 1331(a).

Not only did the court below ignore the controlling provisions of 5 U.S.C. § 7151 and the Rules of the House of Representatives, but it failed to consider the fact that its decision cannot be reconciled with the intent of other important statutes establishing federal causes of action against state officials for constitutional violations, 42 U.S.C. § 1983,[39] and the jurisdiction of the federal judiciary to entertain any case that "ari[ses] under the Constitution," 28 U.S.C. § 1331(a).[40] As a consequence of the decision

---

[39]42 U.S.C. § 1983 (1970), originally included as section 1 of the Civil Rights Act of 1871, provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[40]The Act of March 3, 1875 is the predecessor to 28 U.S.C. §1331(a), the broad jurisdictional grant to the federal courts under which *Bivens* causes of action are entertained. Although there is virtually no legislative history of the Act, it is well settled that, by that statute, "Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts . . . became the *primary* and powerful reliances for vindicating *every right given by the Constitution*, the laws, and treaties of the United States." Frankfurter & Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 65 (1927) *quoted in* Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis added in part). *See also id.* at 246-47 n.8. "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Id.* at 248. *Accord,* District of Columbia v. Carter, 409 U.S. 418, 427-29 (1973); Lynch v. Household Finance Co., 405 U.S. 538, 546-48 (1972).

below, federal legislators would be immune from suits for conduct violating this constitutional mandate but state legislators would not.[41] A federal statutory remedy exists only against the latter, under the authority of 42 U.S.C. § 1983. This anomalous result would wholly distort the intent of the Framers of the Bill of Rights and that of Congress in enacting 42 U.S.C. § 1983.

The legislative history of that statute demonstrates that it was intended to extend the same rights and remedies to victims of constitutional violations by state officers — "whether that action be executive, legislative, or judicial"[42] — as were already available against federal officials.[43] In

[41]State legislators are, of course, absolutely immune from liability for actions within the legislative sphere of legislative activity under the Speech or Debate Clause of the United States Constitution. Tenney v. Brandhove, 341 U.S. 367 (1951). *See* pp. 50-68, *infra*. When their conduct is not so protected, however, they are subject to suit under 42 U.S.C. §1983. Ammond v. McGahn, 390 F. Supp. 655 (D.N.J. 1975), *rev'd on other grounds*, 532 F.2d 325 (3d Cir. 1976) (§1983 actions for First and Fourteenth Amendment violations permissible against twenty-eight New Jersey state senators and other legislative officials). *See also* Johnson v. Reagan, 524 F.2d 1123, 1124 (9th Cir. 1975); Parker v. McKeithen, 488 F.2d 553, 555 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974), Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1973), all holding 42 U.S.C. § 1983 applicable to state legislators but granting immunity from suit since the contested activities fell within the ambit of the Speech or Debate Clause.

[42]Mitchem v. Foster, 407 U.S. 225, 242 (1972), *quoting* Ex Parte Virginia, 100 U.S. 339, 346 (1879).

[43]This Court has recently refused to "draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 98 S.Ct. 2894, 2909 (1978) (holding federal officials entitled to qualified, rather than absolute, immunity from suits charging unconstitutional conduct). This rule is equally applicable in the instant case.

passing § 1983, Congress believed it was *"really re-enacting the Constitution." Cong. Globe,* 42d Cong., 1st Sess. 569 (1871) (emphasis added).[44] "There is no reason to allow federal officials to act with impunity in this context and to bar state officials. The damage to the individual's [constitutional] interests is the same regardless of the perpetrator of the violation." *Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (upholding a *Bivens* cause of action under the First Amendment).

Citing *Paton v. La Prade, supra,* this Court has echoed that analysis in *Butz v. Economou, supra.* "[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983 .... To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." 98 S.Ct. at 2907-8, 2909.

This same reasoning requires that defendant be held accountable for his unconstitutional action in the instant case in the same way as any state legislator.

4. The Lower Court Misinterpreted The Civil Rights Act Of 1964.

The court below erred in relying heavily on the fact that "Congressional remedial legislation for employment discrimination [Title VII of the Civil Rights Act of 1964, as

[44]*See* note 40, *supra.*

amended][45] has carefully avoided creating a cause of action for money damages for one in Davis' position." (A. 50.) It also erred in concluding that implication of a cause of action here would grant petitioner a remedy "far more extensive" than that available to federal employees in the competitive service whom Title VII covers, and reasoning that "Congress [could not] have intended to deal more generously with those in Davis' position, from whom it deliberately withheld protection." (A. 51-2.) Both conclusions are unwarranted.

There is no question that Title VII, by its silence on this subject, does not apply to plaintiff.[46] There is also no question that, by its silence, Congress cannot be deemed to have precluded a constitutional remedy for violation of plaintiff's Fifth Amendment rights. Congress can neither by silence nor by statute negate all remedies for violations of constitutional rights. *Turpin v. Mailet, supra,* 579 F.2d at 163. Although Congress may be free to create alternative remedies that are equally effective, in its judgment, as those the courts would provide for vindication of Fifth Amendment rights, *Bivens, supra,* 403 U.S. at 397, Congress cannot revoke the applicability of the Bill of Rights or eliminate all remedies for its violation. The Constitution is not merely a federal statute. Congress is not free to deny constitutionally-granted rights.

The conclusion of the lower court that Congress intended plaintiff to remain remediless for unconstitutional dis-

[45]42 U.S.C. §2000(e) *et seq.*.

[46]This Court has decided that where Title VII provides a remedy, that remedy is exclusive. Brown v. General Services Administration, 425 U.S. 820 (1976). It has also decided that Title VII has no effect where it does not provide a remedy. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (according non-Title VII judicial remedy for claim of federal employment discrimination).

crimination because implication of a cause of action would grant her a "far more extensive" remedy than that accorded under Title VII (A. 51) is patently without merit. Title VII eliminates the sovereign immunity bar, permitting federal judicial actions and back pay recovery directly against the United States. It also affords plaintiffs a range of equitable relief and establishes an expeditious administrative process. In the instant case, plaintiff's claim is limited to money damages after trial. Thus, her remedy is less extensive than would be available under Title VII.

Nor is the comparison relied upon by the court below a permissible approach to constitutional analysis. If followed, it could sanction violation of constitutional rights by any employer to whom Title VII does not apply. *Bivens* expressly forbids this kind of distinction. 403 U.S. at 410-11 (Harlan, J., concurring). No government official can be free to violate the constitutional rights of any employee. *Butz v. Economou,* 98 S.Ct. 2894, 2905 (1978).

Where the Constitution compels some effective remedy for its violation, Congress' inaction in providing a statutory cause of action for noncompetitive congressional employees cannot foreclose the implication of an appropriate remedy under *Bivens.* Had Title VII or any other statute afforded relief for invasion of plaintiff's Fifth Amendment rights, the statutory methodology should be followed; but where the statute does not attempt to provide a remedy for this intrusion, the statute cannot be used to eliminate the constitutional right.

Many federal courts have implied *Bivens* causes of action under the Fourteenth Amendment against municipalities and agencies of local government for violations of litigants'

constitutional rights.[47] The courts have created this remedy in the absence of a statutory cause of action under 42 U.S.C. § 1983, which, coupled with 28 U.S.C. § 1343(3), provides a federal civil rights action against every "person" acting under color of state law. In *Monroe v. Pape*, 365 U.S. 167, 187-192 (1961), this Court decided that the cause of action provided against "persons" by § 1983 did not include a cause of action against a municipality, looking both to contemporary legislative history surrounding the Civil Rights Act of 1871 and to subsequent legislative efforts to amend that provision expressly to bring municipalities into its ambit. The federal courts, however, have refused to deny civil rights litigants a cause of action against municipalities for violation of constitutional rights merely because that statute had been construed as providing no remedy.[48]

That reasoning is directly applicable in the instant case. The fact that Title VII does not provide a remedy cannot

[47]*See, e.g.*, Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc); Reeves v. City of Jackson, 532 F.2d 491 (5th Cir. 1976); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975); Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); Gray v. Union County Intermediate Education District, 520 F.2d 803 (9th Cir. 1975). One recent decision, Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), has been vacated and remanded for consideration in light of Monell v. New York City Dept. of Social Services. *See* n. 35, *supra*.

[48]See the lengthy discussion of this issue in *Turpin v. Mailet, supra*, 579 F.2d at 160-66. The en banc court stated that if it accepted the argument that §1983 precluded implication of a remedy against a municipality for constitutional violations it "would be forced to accept the objectionable concept that Congress' failure to provide a remedy for every conceivable constitutional violation demonstrates a belief by Congress that certain injustices must remain unredressed." Turpin v. Mailet, *supra*, 579 F.2d at 162.

prohibit this Court from implying one to vindicate Fifth Amendment violations.[49]

5. 2 U.S.C. § 92 Does Not Authorize A Member Of Congress To Engage In Unconstitutional Discrimination.

Neither can the broad provision regarding discharge of congressional staff in 2 U.S.C. § 92[50] buttress the conclusion of the court below that Congress has foreclosed judicial remedy for constitutional violations in employment.[51] The fact that a member of Congress is permitted by 2 U.S.C. § 92 to discharge his employees "without cause" does not mean he is permitted to commit unconstitutional sex discrimination in discharging a secretary. Members of Congress must of course have wide latitude in staffing determinations. Nowhere, however, does 2 U.S.C. § 92 purport to authorize action that flagrantly violates basic

[49]That Monell v. New York City Dept. of Social Services makes the necessity for implication of this Fifth Amendment cause of action moot, *see* n.35, *supra*, does not negate the aptness of the analogy.

[50]2 U.S.C. §92 provides generally for the "payment of appropriations for clerk hire for Members, Delegates, and Resident Commissioners" of the House of Representatives and the number of such "clerks" to which each is entitled. Its proviso states "[t]hat such persons shall be subject to removal at any time by such Member, Delegate, or Resident Commissioner with or without cause."

[51]Defendant conceded this point before the district court:

> "Defendant respectfully submits that in the face of such clear statutory language [2 U.S.C. §92], the only limitation which conceivably could be imposed upon defendant's right to discharge plaintiff is a constitutional one." Reply to Plaintiff's Memorandums in Opposition to Defendant's Motion to Dismiss. (R. 49.)

constitutional rights. That defendant could have dismissed plaintiff at any time without violating the Constitution cannot preclude awarding her damages for a dismissal that was in actuality unconstitutional. *See Perry v. Sindermann,* 408 U.S. 593 (1972); *Board of Regents v. Roth,* 408 U.S. 564 (1972) (nontenured teachers may be dismissed without cause, but *not* for reasons infringing constitutional interests). *Cf. Silver v. New York Stock Exchange,* 373 U.S. 341, 365 n.18 (1963).

Of course, not all job selection criteria constitute prohibited "discrimination." Job qualifications that are "reasonably related" to the work involved are readily justified.[52] It is also entirely possible that some job criteria would be permitted under 2 U.S.C. § 92 for a member of Congress that would be prohibited "discrimination" for others, because of the unique role of elected representatives under the Constitution. Members of Congress are elected to represent a particular geographical district and a particular political party, and their employment of persons only from

[52]In adjudicating claims under Title VII, this Court has established "job-relatedness" as one criterion of the "business necessity" defense to otherwise impermissible discrimination practices. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Prior to the 1972 amendments to Title VII that brought certain public employers into its scope, many employment discrimination suits against those employers were brought as Fourteenth Amendment equal protection suits, under 42 U.S.C. § § 1981 and 1983 causes of action. In choosing a standard to apply in the constitutional situation, virtually every court rejected standard "equal protection analysis" and instead looked to the "job-relatedness" standard evolving in the Title VII context. *E.g.,* Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), *appeal after remand,* 497 F.2d 1113 (1974), *cert. denied,* 421 U.S. 991 (1975). That analogy is equally appropriate here.

their district and political party could thus be regarded both as "reasonably related" to the work involved and as appropriately reflecting their peculiar historical and constitutional function.[53]

Those situations, however, are clearly distinguishable from the instant case. Whatever might be said about uniquely "political" discrimination by a member of Congress has no bearing upon discrimination relating to sex. Sex, like race and national origin, is a classification subject to close judicial scrutiny because it is "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). Regardless of which standard is used to test equal protection, there can be no question that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . .' [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Id.* (citations omitted). This kind of characteristic has "too often been inexcusably utilized to stereotype and stigmatize politically powerless segments of

[53]*See* Remarks of Senator Glenn during the debate concerning S. Res. 431, proposed as an amendment to the Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887. That resolution would have provided an administrative remedy for discrimination complaints of certain Senate employees. The Senator made clear, as did the Report of the Committee on Governmental Affairs, that geographical preferences and political party choices were permissible and could not be construed as evidence of discrimination. 124 Cong. Rec. S18228 (daily ed. October 11, 1978); S. Rep. No. 729, 95th Cong. 2d Sess. 6 (1978).

society." *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting).

Under no theory can plaintiff's sex in the instant case be thought to be "reasonably related" to her "ability to perform" the secretarial and other related clerical functions involved in her job. Indeed, defendant himself described her as an "extremely capable secretary," and traditionally secretarial duties have been deemed to be appropriate for women.

6. Principles Of Statutory Construction Require That Title VII And 2 U.S.C. § 92 Be Interpreted To Exclude Unconstitutional Conduct.

Although no statute need be considered in determining whether a cause of action arises directly under the Constitution, if congressional actions are deemed relevant they must be construed harmoniously and, if possible, in a way that avoids a finding of unconstitutionality.[54] The statutes pertinent to the instant case can be harmonized only by construing 2 U.S.C. § 92 and Title VII not to include conduct prohibited both by 5 U.S.C. § 7151 and the Constitution. Indeed, this approach is compelled, because

[54]Morton v. Mancari, 417 U.S. 535, 550-51 (1974); Bowman v. Texas Education Foundation, Inc., 454 F.2d 1097, 1101 (5th Cir. 1972); Northern Natural Gas Co. v. Grounds, 441 F.2d 704, 719 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971); Baines v. City of Danville, 337 F.2d 579, 590-91 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); Panama Canal Co. v. Anderson, 312 F.2d 98, 100 (5th Cir. 1963); Hyrup v. Kleppe, 406 F. Supp. 214, 217 (D. Colo. 1976); Florida East Coast Ry. v. United States, 259 F. Supp. 993, 996 (M.D. Fla. 1966) (3-judge court), *aff'd*, 386 U.S. 544 (1967); United States v. Five Gambling Devices, 346 U.S. 441, 448-49 (1953); Ashwander v. TVA, 297 U.S. 288, 348 n.8 (1936), (Brandeis, J., concurring).

legislation permitting employment discrimination on the basis of race or sex by a congressman would be unconstitutional.[55] *Miranda v. Arizona*, 384 U.S. 436, 491 (1966).

[55]Subsequent and fledgling efforts by Congress to implement its anti-discrimination rules, *supra*, by providing an administrative mechanism for the consideration of discrimination complaints by congressional employees may not be considered either as indicative of congressional intent to provide a remedy or of the need for judicial inaction. Even had Senate Resolution 431 or House Resolution 1380 not failed of passage prior to the congressional recess in October 1978, they would neither have provided a remedy to plaintiff here nor have foreclosed the possibility of implication of a cause of action under the Constitution. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Indeed, the proponents of S. Res. 431 thought a judicial remedy was already available under the decision of the panel below to plaintiffs charging constitutional violations.

> "[S]ince no statute has granted jurisdiction to the courts for the enforcement of equal opportunity in Congress, judicial remedies are available only to the extent that Constitutional rights have been violated. (Under Passman v. Davis [sic], 544 F.2d 865 (5th Cir. 1977), plaintiff may assert a discrimination claim under the equal protection provision of the Due Process Clause.)" S. Rep. No. 729, 95th Cong., 2d Sess. 8 (1978).

See also 124 Cong. Rec. S18209, S18228 (daily ed. October 11, 1978).

These resolutions, like proposed amendments to 42 U.S.C. §1983, may not be deemed to express by their failure congressional intent. As discussed above, in the cases where §1983 did not apply, the courts have been prepared to imply *Bivens* causes of action for constitutional violations. The same is required here.

II.

THE SPEECH OR DEBATE CLAUSE DOES NOT PROVIDE IMMUNITY TO DEFENDANT FOR UNCONSTITUTIONAL SEX DISCRIMINATION IN THE INSTANT CASE.

A. Because Discharging A Secretary Solely And Expressly On The Basis Of Her Sex Is Not Within The "Sphere Of Legislative Activity," The Speech Or Debate Clause Affords Defendant No Legislative Immunity.

If this Court holds that plaintiff has a private cause of action for money damages arising under the Fifth Amendment, the issue whether defendant can cloak himself with absolute immunity from suit becomes one of controlling importance.[56] Having won the right to proceed, plaintiff would still be prevented from securing redress for her injuries if defendant is entitled to absolute legislative immunity.[57]

[56]In the proceedings below, both the district court and the panel of the court of appeals held that no immunity doctrine would bar this action. Although the question whether art. I, §6, the Speech or Debate Clause of the United States Constitution, protects the congressman from judicial inquiry was expressly framed for rehearing (A. 41), the en banc court of appeals did not address the issue.

[57]The only immunity doctrine that defendant can seriously seek to invoke is that of legislative immunity, founded in the Speech or Debate Clause of the Constitution. Although at various points in the proceedings below defendant has asserted that sovereign or absolute official immunity should apply, those contentions are without merit.

As to the claim of sovereign immunity, plaintiff sues defendant in his individual capacity. No relief against the United States has been requested. This action is now limited to a claim for money damages that

(continued)

The Speech or Debate Clause[58] provides a member of Congress with absolute immunity from liability for activities that fall within its ambit, and thus bars any lawsuit. It is well established that the Speech or Debate Clause has "finite limits." *Doe v. McMillan,* 412 U.S. 306, 317 (1973). On nine separate occasions this Court has determined where the boundaries of the Clause in fact lie.[59] This Court has interpreted the Clause to effectuate its intended purposes, holding that legislative immunity protects those activities "essential to legislating." *Gravel v. United States,* 408 U.S. 606, 621 (1972). The decision to discharge an office worker

(footnote continued from preceding page)

will be assessed against defendant personally. The sovereign immunity doctrine is inapplicable, since no recovery against the United States Treasury is contemplated. Land v. Dollar, 330 U.S. 731 (1947).

As to the claim of absolute official immunity, this Court has held that, in the case of federal legislators, any common law privilege against legal suit was incorporated into the Constitution as art. I, §6, Tenney v. Brandhove, 341 U.S. 367, 379 (1951), and the immunity provided is coextensive with that of the Speech or Debate Clause, Doe v. McMillan, 412 U.S. 306, 324 (1973). Even were this Court to depart from those precedents and accord defendant an immunity different from that afforded legislators by the Speech or Debate Clause, that immunity would not be absolute, but must be limited to a good faith defense at trial. Butz v. Economou, 98 S. Ct. 2894 (1978).

[58]The Clause provides in pertinent part "for any speech or debate in either house [the Senators and Representatives] shall not be questioned in any other place." U.S. Const., art. I, §6.

[59]Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).

on the basis of sex is not such an action.[60] To extend the boundaries of the protection to events so removed from the legislative process would controvert both the historical mandate of the Framers and subsequent judicial interpretation of the Clause.

1. Both The History And Plain Meaning Of The Speech Or Debate Clause Compel The Conclusion That It Does Not Protect Defendant Here.

The literal core of legislative immunity is "speech or debate in either House." This Court has always been mindful of the purposes of the Framers in mandating this immunity for federal legislators and has refused to broaden its scope to a grant of personal prerogative. In interpreting the Clause, the Court has consistently stated that any protected activity must be an "integral part" of the legislative process. *Gravel v. United States, supra,* 408 U.S. at 625.

The "central role" and "fundamental purpose" of the Speech or Debate Clause is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Id.* at 617-18. *See also Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502 (1975); *United States v. Brewster,* 408 U.S. 501, 507-09 (1972); *United States v. Johnson,* 383 U.S. 169, 181 (1966). Their memories of abuse of parliament by the monarchy and its judges still fresh, the Framers sought to ensure the independence of the legislative branch. In essence, the Clause is a statement of separation of powers

[60]It must be emphasized that petitioner performed only secretarial and related clerical functions. Respondent's termination letter twice refers to her role as "secretarial" and makes no suggestion that she participated in legislative or policy-making decisions. (A. 6, 7.)

rather than a grant of unfettered privilege. *See* 62-68, *infra.*

Defendant's discharge of a secretary could not be further removed from these purposes. His employment practices, as they pertain to clerical personnel, do not affect the legislative process at all. To immunize him from liability for the consequences of his clerical employment decisions would contradict the intentions of the Framers.

> "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster, supra,* 408 U.S. at 507.

See also Eastland v. United States Servicemen's Fund, supra, 421 U.S. at 502; *Gravel v. United States, supra,* 408 U.S. at 626.[61]

It is in that context — protection of the legislator in his legislating capacity — that the breadth of the Speech or Debate Clause has been interpreted and applied by this Court. Its "fundamental purpose" is "freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator.*" *Gravel v. United States, supra,* 408 U.S. at 618 (emphasis added). It is the legislative task, "represent[ing] the interests of their

[61]As Senator Metcalf, Chairman of the Joint Committee on Congressional Operations, acknowledged, "Legislative immunity is assumed by many to be a personal privilege or perquisite of office of individual Members of Congress, freeing them from being called to account for any indiscretion or misdeed. *Nothing could be further removed from the reality of the situation.*" "Constitutional Immunity of Members of Congress," *Hearings Before the Joint Committee on Congressional Operations,* 93d Cong., 1st Sess. 2 (1973) (emphasis added) (hereinafter "Joint Committee Hearings").

constituents without fear that they will be later called to task in the courts for that representation," *Powell v. McCormack,* 395 U.S. 486, 503 (1969), which the Clause safeguards. It is not the individual but the independent legislature which is to be protected. Defendant cannot cloak himself in immunity unless his actions pertain to "speech or debate" as so interpreted. This Court has admonished that "[w]e would not think it sound or wise . . . to extend the privilege beyond . . . [the] literal language [of the Clause] . . . ," *United States v. Brewster, supra,* 408 U.S. at 516, and that in light of the potential abuse of the Clause, its protective ambit should be no broader than that "necessary to preserve the integrity of the legislative process." *Id.* at 517.

2. Prior Case Law Affords Defendant No Protection Under The Speech Or Debate Clause.

In its efforts to construe the Speech or Debate Clause in conformity with the Framers' purposes, this Court has consistently held that only actions "in the sphere of legitimate legislative activity" are protected. *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). Beyond literal speech or debate, the Clause protects activities taking place "in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson,* 103 U.S. 168, 204 (1880). Such activities must be "things generally said or done in the House or the Senate in the performance of official duties," *United States v. Brewster, supra,* 408 U.S. at 512, and must be an "integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the

consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States, supra,* 408 U.S. at 625.

This Court has clearly stated that an activity does not qualify for speech or debate protection merely because it is in some remote or tangential way "related" to the legislative process.

> "We would not think it sound or wise, simply out of an abundance of caution . . . to extend the privilege beyond its intended scope, its literal language, and its history, to include all things *in any way related* to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *United States v. Brewster, supra,* 408 U.S. at 516 (emphasis added).[62]

Neither are all activities "regularly" or "generally" done by members of Congress coterminous with legislative activity protected by the Clause. *Doe v. McMillan, supra,* 412 U.S. at 313; *Gravel v. United States, supra,* 408 U.S. at 625; *McSurely v. McClellan,* 533 F.2d 1277, 1286 n.28 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom. McAdams v. McSurely,* 98 S. Ct. 3116 (1978).

Those activities held immunized by the Clause have been either (1) part of the *actual process* of investigating,

[62]Defendant concedes that his conduct did not relate to the "*direct* discharge of legislative functions," but argues that speech or debate protection should be extended to "those activities *incidental* to the direct performance of the legislative function." Brief in Support of Petition for Rehearing En Banc at 6-7 (emphases in original). This would require this Court to overrule *Brewster's* holding that an activity is not entitled to speech or debate protection unless it is an actual part of the legislative process.

formulating, and voting on legislation, or (2) part of the *actual performance* of other business which "the Constitution places within the jurisdiction of either House."[63] *Gravel v. United States, supra,* 408 U.S. at 625. Activities held immune including voting on legislation, *Kilbourn v. Thompson, supra,* 103 U.S. at 168; speeches on the House floor, *United States v. Johnson, supra,* 383 U.S. at 176-77; congressional investigations, *Doe v. McMillan, supra,* 412 U.S. at 306; issuance of investigatory subpoenas, *Eastland v. United States Servicemen's Fund, supra,* 421 U.S. at 491; subcommittee hearings, *Gravel v. United States, supra,* 408 U.S. at 606; and internal circulation of reports, *Doe v. McMillan, supra,* 412 U.S. at 312.

Speech or debate defenses have been rejected in a number of cases arguably closer to the legislative process than is the firing of an office worker. Acknowledging that members of Congress perform a myriad of activities, the courts will not extend the Clause to protect those not "essential to legislating." Activities held not to be immunized by the Clause include communication with the Department of Justice, *United States v. Johnson, supra,* 383 U.S. at 172, or the Executive Branch and administrative agencies, *Gravel v. United States, supra,* 408 U.S. at 625 and *Hutchinson v. Proxmire,* 579 F.2d 1027, 1032 (7th Cir. 1978); gathering information antecedent to a hearing, *Gravel v. United States, supra,* 408 U.S. at 628; improper dissemination of actionable information outside Congress, *Doe v. McMillan,*

[63]An example of this second category of business constitutionally placed within the jurisdiction of either House is found in Consumers Union of the United States, Inc., v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975) (accreditation of a periodical to the congressional press gallery held to be a legislative function). Firing an office worker obviously does not fall within this category.

supra, 412 U.S. at 316; *Gravel v. United States, supra,* 408 U.S. at 625, and *McSurely v. McClellan, supra,* 553 F.2d at 1285-86; and unconstitutional acts committed during an investigation, *United States v. Brewster, supra,* 408 U.S. at 526, *Dombrowski v. Eastland, supra,* and *McSurely v. McClellan, supra.* These cases are persuasive authority for rejecting the defense in the instant case as well.

If these activities are unprotected by the Speech or Debate Clause, the dismissal of a clerical employee cannot be immunized. The firing of plaintiff solely on the basis of gender has nothing to do with the legislative process or "speech or debate." Plaintiff's suit in no way undermines the purposes or protections of the Speech or Debate Clause. Defendant was acting not as a legislator, but as an employer.

Defendant has urged, however, that because *all* staff employees are extremely important to members of Congress, the Speech or Debate Clause should confer absolute discretion in firing any employee. Defendant has argued that this importance is highlighted by the fact that such employees have been held entitled to speech or debate immunity themselves when fulfilling a legislative function as surrogate for their employer. Brief in Support of Petition for Rehearing En Banc at 5, citing *Gravel v. United States, supra.*

Defendant's argument, however, draws no support from the case law. Previous decisions have extended such a privilege only to relatively high-level staff members in policy-making positions, such as legislative aides, *Gravel v. United States, supra,* or committee counsel, *Eastland v. United States Servicemen's Fund, supra,* where the activities of the member and the employee were not distinguishable. *Eastland v. United States Servicemen's Fund, supra,* 421 U.S. at 507. Plaintiff was a secretary. Moreover,

defendant has ignored the cases where legislative employees who participated in unconstitutional activity were held responsible for their acts, regardless of the immunity extended to the member of Congress. *Powell v. McCormack, supra; Dombrowski v. Eastland, supra; Kilbourn v. Thompson, supra.* Merely because an employee may derive from the Speech or Debate Clause immunity from suit for engaging in legislative activities at the behest of a member of Congress does not mean that the member's employment decisions may be based on an impermissible criterion such as race or sex.

The issue in this case is not whether a high-level aide engaged in legislative or policy-making activity would enjoy the legislator's immunity, but whether a congressman is protected in his decision to fire an office employee whom he has never asserted had such responsibilities. This Court need not decide the question whether defendant would be entitled to speech or debate protection if he discharged a policy-making aide for unconstitutional reasons.

In *Elrod v. Burns,* 427 U.S. 347, 367, 372 (1976), this Court ratified that distinction in prohibiting the patronage firing of nonpolicy-making officials on First and Fourteenth Amendment grounds. In determining whether non-civil service employees of county government, who alleged they were discharged or threatened with discharge solely because of their partisan political affiliation, stated a claim for deprivation of constitutional rights, this Court held that patronage dismissals "clearly infringe First Amendment interests," *id.* at 360. That encroachment is permitted only by the government's demonstration that a vitally important interest is at stake, *id.* at 362, and that the benefit to the government outweighs the loss of constitutionally protected

rights, *id.* at 363. The interest advanced in support of patronage was the need for political loyalty of employees, *id.* at 367. While acknowledging the strength of this justification, this Court refused to validate patronage entirely, but instead decided that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.*

In distinguishing policy and nonpolicy-making positions, this Court admonished that "The nature of the responsibilities is critical" and articulated several criteria for making the determination:

> "While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policy-making position. . . Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 367-68.

Here, plaintiff was in no way related to the legislative or policy aspects of defendant's office. Her work was solely clerical. Plaintiff was responsible only for general office administration. She had no advisory or planning functions, and defendant's stated reason for discharging her was not remotely related to legislative or policy considerations.

If the act of which plaintiff complains here is regarded as a "legislative" activity entitled to congressional immunity, a member of Congress will be exempt from liability for

virtually any action. Under such a broad reading, even such conduct as violating the terms of a lease on a rented office in a member's home district would be immune from suit. Such a holding would cut the Speech and Debate Clause loose from its sound mooring in things said or done in the actual legislative process.

Thus, the Court need not consider how the interests that the Speech or Debate Clause protects can be harmonized with claims that might be made by other plaintiffs in other cases. In this case — where the allegation of sex discrimination is explicit and documented, where plaintiff did not hold a policy-level position and was not an intimate advisor or representative of the congressman, and where the Rule 12(b)(6) posture of the case precludes speculation about defenses that may be raised at trial — this Court should hold that the Speech or Debate Clause does not bar this suit.

3. The Speech Or Debate Clause Should Be Construed Narrowly When Claimed As a Defense To Unconstitutional Conduct.

In interpreting the Speech or Debate Clause, this Court has stated that it takes a "decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Gravel v. United States, supra,* 408 U.S. at 620.[64] Members of Congress are not "super-citizens,"

[64] *See also* Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); United States v. Johnson, 383 U.S. 169, 172 (1966); Tenney v. Brandhove, *supra,* 341 U.S. at 377; Kilbourn v. Thompson, 103 U.S. 168, 204 (1880); McSurely v. McClellan, 521 F.2d 1024, 1037 (D.C. Cir. 1975), *aff'd by an equally divided court,* 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom.* McAdams v. McSurely, 98 S. Ct. 3116 (1978).

United States v. Brewster, supra, 408 U.S. at 516, and "ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons," *Gravel v. United States, supra,* 408 U.S. at 615. Defendant's unconstitutional action should therefore be judged by a stricter standard than if his action were, for example, merely a common law tort.[65]

This Court has recently made this distinction in the context of determining whether executive branch official immunity for unconstitutional action should be qualified or absolute. *Butz v. Economou,* 98 S. Ct. 2894 (1978). Refusing to grant the latter under the authority of *Barr v. Matteo,* 360 U.S. 564 (1959), a defamation action against the acting director of a federal agency, this Court in *Economou* stated "that a quite different question would have been presented [in *Barr*] had the officer ignored an express statutory or constitutional limitation on his authority . . . [W]e are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness

[65] *See* Reinstein & Silverglate, *Legislative Privilege and The Separation of Powers,* 86 Harv. L. Rev. 1113, 1174-75 (1973):

> "Even assuming, however, that tort suits in general should or will continue to be precluded by the speech or debate clause, functional considerations indicate that the courts should exercise their jurisdiction and consider redress for legislative violations of individuals' *constitutional* rights . . . . Judicial review of unconstitutional legislative action should not be foreclosed whether that action takes the form of a statute or the conduct of an individual congressman. The speech or debate clause cannot be read in isolation from the entire constitutional scheme; judicial respect for and enforcement of the Bill of Rights is no less important than respect for the prerogatives of individual congressmen." (Emphasis in original.) (Footnotes omitted.)

See also Joint Committee Hearings, *supra.*

embodied in the Constitution." *Butz v. Economou, supra,* 98 S. Ct. at 2902, 2905. This Court, limiting its conclusion to the constitutional issues, accorded federal officials only a qualified immunity for alleged violations of constitutional rights by analogy to 42 U.S.C. § 1983. *Id.* at 2905. That analogy and analysis are equally appropriate here.

B. Even Though A Coordinate Branch Of Government Is Involved, This Court Should Not Decline to Enforce The Constitution.

Because our constitutional system is predicated upon three independent branches of government, courts are understandably reluctant to intervene in the affairs of a coordinate branch. Indeed, the *Bivens* court acknowledged that there might be "special factors counseling hesitation" in some instances, in implying causes of action for money damages directly from the Constitution. 403 U.S. at 396.[66] Judicial intervention in this matter is justified, however, because it is essential for the vindication of paramount constitutional principles.

1. This Court Has Sustained Individual Rights In Actions Against Congress And The Executive Branch.

This is a case of blatant unconstitutional discrimination by a member of Congress acting in his individual capacity. It is not a suit against the United States, nor is it an action challenging an act of Congress or the Executive Branch. The

[66]The only factor articulated was that of "federal fiscal policy as in United States v. Standard Oil Co., 332 U.S. 301, 311 (1947)." There are no such special factors here.

doctrines variously invoked to prohibit judicial intervention — including "sovereign immunity," "political question," and "separation of powers" — are totally inapposite to the instant case. Those doctrines govern the relationship of the judiciary with the other *institutions* — not that of the judiciary with an *individual.* When Congress has enunciated as an institution that employment decisions made without regard to race, color, religion, sex, or national origin, 5 U.S.C. § 7151, do not interfere with any proper legislative function, there is no reason for this Court to come to an opposite conclusion or to stay its hand on a bare record.

The only basis on which the judiciary could refrain from deciding this matter would be constitutionally-created legislative immunity under the Speech or Debate Clause. *See* pp. 50-62, *supra.* That bar, however, has no bearing on the questions whether to imply a *Bivens* cause of action or whether to refrain from decision here solely because a *member* of Congress is involved.

This Court has responded to the needs of civil rights litigants, even when the cause of action has arisen against the legislative or the executive branch. In many of these cases, far more interference in the functioning of those branches was required than in the case of an employee suing an individual member of Congress for his personal, non-legislative activities.

In suits involving members of Congress, separation of powers questions have been resolved by reference to the Speech or Debate Clause — the ultimate guarantor of separation of powers.[67] *United States v. Johnson,* 383 U.S.

[67]"While an inquiry such as is involved in the present case, because it involves two coordinate branches of Government, must necessarily have separation of power implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts of Congress,

(continued)

169, 178 (1966); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502 (1975); *Kilbourn v. Thompson,* 103 U.S. 168, 190-200 (1880). The only legislative activities which have been held to present "political questions" and therefore to be nonjusticiable are those expressly delegated to Congress, *e.g.,* adoption of constitutional amendments and the war-making power under art. I, § 8. *See, e.g., Massachusetts v. Laird,* 400 U.S. 886 (1970); *Coleman v. Miller,* 307 U.S. 433 (1939). *See also Baker v. Carr,* 369 U.S. 186 (1962); *Powell v. McCormack,* 395 U.S. 486 (1969).

The very purpose of the Speech or Debate Clause, providing legislative immunity for members of Congress from suits where it applies, was to protect the legislature "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary." *United States v. Johnson, supra,* 383 U.S. at 179. Nonetheless, when this Court has found congressional activity to exceed the bounds of the Speech or Debate Clause, it has not been hesitant to exercise its responsibility in scrutinizing the action of the coordinate branch. *Doe v. McMillan,* 412 U.S. 306, 320 (1973); *Tenney v. Brandhove,* 341 U.S. 367 (1951). Individual rights have been sustained even in cases where the member himself was immune from suit by virtue of the Clause. *Doe v. McMillan, supra,* 412 U.S. at 320; *Gravel v. United States,* 408 U.S. 606, 618-20 (1972); *Tenney v. Brandhove, supra,* 341 U.S. at 377 (1951); *Kilbourn v. Thompson, supra,* 103 U.S. 168 (1880). And when the member's actions have exceeded the bounds of that Clause, this Court has not been

(footnote continued from preceding page)
see, e.g., Kilbourn v. Thompson, *supra;* Dombrowski v. Eastland, *supra,* even when the Executive Branch is also involved, *see, e.g.,* United States v. Brewster, *supra;* Gravel v. United States, *supra.*" Doe v. McMillan, 412 U.S. 306, 318 n.12 (1973).

reluctant to permit prosecution. *United States v. Brewster,* 408 U.S. 501 (1972) (Senator may be prosecuted under criminal statute for accepting bribe in exchange for legislative act). This Court's task is "to apply the Clause in such a way as to insure the independence of the legislature without altering the historical balance of the three co-equal branches of Government." *Id.* at 508. The "speech or debate privilege was designed to preserve legislative independence, not supremacy."[68] *Id.*

The courts have also refused to insulate unilateral action by an official of the Executive Branch from judicial review pursuant to the separation of powers doctrine. *See, e.g.,*

[68] *See also* Powell v. McCormack, 395 U.S. 486 (1969). In *Powell,* respondents, various members of the House of Representatives, contended that the Speech or Debate Clause and political question doctrine barred petitioner's action contesting, *inter alia,* a House Resolution denying him his seat. The House, they contended, had exclusive power to police its own membership. That argument was rejected on both grounds. Powell v. McCormack, 395 U.S. 486, 501-06, 518-48 (1969). The intrusion into the internal affairs of Congress in *Powell* was far greater than that which would occur here. Should defendant raise similar arguments, they should be rejected on *Powell's* authority.

It also should be noted that the issue of federal court jurisdiction to entertain the action was raised in Powell v. McCormack. Two years before the decision in *Bivens,* this Court held that the federal courts could entertain this action under its "arising under" jurisdiction. "[A] suit 'arises under' the Constitution if the petitioner's claim 'will be sustained if the Constitution' . . . [is] given one construction and will be defeated if [it is] given another," citing Bell v. Hood, 327 U.S. 678, 685 (1946). Powell v. McCormack, *supra,* 395 U.S. at 514. Because 28 U.S.C. §1331(a) grants federal courts "arising under" jurisdiction, the Court held the suit to be authorized by the statute. Although that plaintiff did not request money damages, his cause of action was otherwise like *Bivens,* and a prelude to that decision. Congressman Powell had no statutory cause of action. This Court granted him equitable relief.

Nixon v. Administrator of General Services, 433 U.S. 425, 441-46 (1977); *United States v. Nixon,* 418 U.S. 683 (1974); *Iowa ex rel. State Highway Commission v. Brinegar,* 512 F.2d 722 (8th Cir. 1975); *Pennsylvania v. Lynn,* 501 F.2d 848 (D.C. Cir. 1974); *National Treasury Employee's Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974); *Louisiana ex rel. Guste v. Brinegar,* 388 F. Supp. 1319 (D.D.C. 1975).

This is a case where the courts need only perform their traditional and special function — constitutional interpretation. *Marbury v. Madison,* 1 Cranch 137 (1803). *See also Powell v. McCormack,* 395 U.S. 486, 548-9 (1969); *Baker v. Carr,* 369 U.S. 186, 211 (1962). Particularly where no interference with the internal affairs of Congress is required, this Court should not abstain. Since defendant himself is not personally immune by virtue of the Constitution, there is no bar to trial.

2. Defendant's Action Is *Ultra Vires* And Not Entitled To Judicial Self-Restraint.

The unconstitutional action of defendant in the instant case is clearly an *ultra vires* activity. Surely a congressman sworn to protect and defend the Constitution, 5 U.S.C. § 3331, is not permitted to cloak unconstitutional activity with the mantle of his office. The courts have held that actions usually nonjusticiable are nonetheless appropriate for judicial resolution when "clear abuse" or "arbitrary or discriminatory" use of discretion, or actions outside the scope of the official's authorized power, are at issue. This is

especially true for suits alleging personal injury and requesting money damages.[69]

In the first case interpreting the Speech or Debate Clause, this Court expressly reserved the question, but implied that *ultra vires* activity would be entitled to no protection:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an *extraordinary character,* for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, *we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." Kilbourn v. Thompson, supra,* 103 U.S. at 204-205. (Emphasis added.)

Later speech or debate decisions have implicitly adopted this conclusion. *Tenney v. Brandhove, supra,* 341 U.S. at 378-9; *United States v. Brewster, supra,* 408 U.S. at 510. Although suits against members of Congress have not traditionally been subject to this kind of "excessive authority" analysis — precisely because the nature of the implicated activity was nonlegislative — *ultra vires* activities can

[69]See Gilligan v. Morgan, 413 U.S. 1 (1973); Haines v. Kerner, 404 U.S. 519, *reh. denied,* 405 U.S. 948 (1972) (suits will be entertained against the executive branch in egregious circumstances); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949); Dugan v. Rank, 372 U.S. 609 (1963) (suits against federal officers for *ultra vires* activities are not suits against the sovereign because the challenged activity exceeds the scope of the official's authorized power).

be entitled to no protection regardless of their relationship to legitimate legislative activity.[70] Unconstitutional activity by a congressman is clearly impermissible. Defendant's action constitutes conduct which, under the principles articulated above, may and should be subject to judicial review by a federal court.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals en banc should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

SANA F. SHTASEL
PETER BARTON HUTT
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

---

[70] *See also* McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom.* McAdams v. McSurely, 98 S.Ct. 3116 (1978); Gravel v. United States, *supra*, 408 U.S. at 621; United States v. Brewster, *supra*, 408 U.S. at 526, suggesting that speech or debate immunity dissolves when unlawful means are used to implement legitimate legislative objectives. "The employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating.' " McSurely v. McClellan, *supra*, 553 F.2d at 1288.